

CHEQUES PROFFERED

IN FULL AND FINAL

SATISFACTION

- a matter of principle

J.H. Black, Law of Contract, Masters Dissertation
May 1992

CONTENTS

1. Introduction	1
2. The decision in <u>Homeguard Products (NZ) Limited</u>	5
3. What type of contract is involved when a cheque is "accepted" in full and final satisfaction of a claim?	12
4. Agreement	25
5. Consideration	45
a) Disputed Debt	45
b) Is there good consideration if the debtor merely pays a liquidated or undisputed portion of the debt?	63
c) Should consideration 'in fact' be sufficient?	67
d) Promissory Estoppel and Waiver	73
6. Section 21(2)(b) of the <u>Bills of Exchange Act 1908</u>	83
7. Estoppel by Conversion?	94
8. Section 92 of the <u>Judicature Act 1908</u>	96
9. Policy Considerations	106
10. Conclusion	114
11. Bibliography	115

1. INTRODUCTION

Despite popular perception, the law in relation to "cheques in full and final satisfaction" is not a separate branch of the law of contract. The law pertaining to cheques in full and final satisfaction is simply an application of the common law principles of accord and satisfaction. It is perhaps for this very reason that prior to the landmark High Court decision in Homeguard Products (NZ) Limited v Kiwi Packaging Limited¹ there were very few New Zealand decisions concerning the same.

The factual situation which gives rise to such a scenario is relatively straightforward. A simple illustration would be that of a building contract, where the builder had been instructed to, and had built a house for another party to occupy. A dispute may then have arisen as to the quality of the workmanship, the owner asserting that a defective job had been done. The owner may then tender a cheque to the builder for a lesser sum than was due under the contract, asserting that the same is proffered in full and final settlement of the dispute. This letter and cheque may arrive in the mail and be opened by a clerk employed by the builder, who has authority to bank cheques but no authority to settle claims. This clerk may then without noting the terms of the letter, detach and bank the cheque. Several days later this letter may then come to the attention of the builder, who then writes back to the owner expressly stating that he does not accept that he has received the cheque in full and final satisfaction, has banked it on account, and will be pursuing the owner for the balance.

On this scenario, if the proposition of Mahon J. in the case of Homeguard is correct, then upon the clerk employed by the builder banking the cheque tendered in full and final satisfaction an accord and satisfaction would have resulted, and despite the builder's protests to the contrary, he would be unable to sue for the balance he felt due to him under the previous contract.

As the existing case law stands there is an onus on the creditor if he banks the cheque to inform the debtor that his payment in full condition is rejected. Some cases state this must be done at the time, others suggest that days is too late, and generally uncertainty reigns as to when a creditor will be taken to be bound by the debtor's payment in full offer.

The most often quoted definition of accord and satisfaction is that of Scrutton L.J. in British Russian

¹[1981] 2 NZLR 322

Gazette and Trade Outlook Limited v Associated Newspapers Limited²:

"... Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or a tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative ..."

Therefore, in other words, an accord and satisfaction is merely a peculiar type of contract. As with other contracts, it requires an offer, an acceptance and consideration. The consideration is often payment of a lesser sum where the debt is disputed or unliquidated. Payment of a lesser sum where the debt is undisputed and liquidated by virtue of Foakes v Beer³ is no consideration. This will be dealt with more fully in Chapter 5(a).

In the typical case of a cheque proffered in full and final satisfaction of a disputed claim, the cheque accompanied by an appropriately worded letter, is seen as the offer. The difficulty occurs in determining whether or not this offer has been accepted. Mahon J. stated in Homeguard that banking by a creditor of such a cheque proffered in full and final satisfaction of a disputed claim amounted to an "irretrievable manifestation of assent" by the creditor to the condition upon which the cheque was proffered⁴.

This paper will attempt to show that the decision in Homeguard and the many decisions after it which either attempt to follow, distinguish or decline to follow it are not in accordance with basic contract principles such as offer and acceptance, and what constitutes consideration. In doing so this paper will examine closely the Homeguard decision itself and whether the contract involved in a typical cheque "accepted" in full and final satisfaction of a claim, is a unilateral or bilateral contract. This paper will then examine the common law principles and reasoning behind the rules governing when a contractual offer has been accepted. In particular, this paper will attempt to show that the cases in relation to cheques tendered in full and final satisfaction, have overlooked the basic common law rule that acceptance needs to be communicated to the offeror before it is complete, and the

²[1933] 2 KB 616, 643-644

³(1884) 9 AC 605.

⁴Supra Note 1 at page 333 line 32 per Mahon J.

rationale behind the rule in Felthouse v Bindley⁵ which stipulates that an offeror cannot stipulate silence to mean acceptance. The rationale for this rule is twofold. Firstly stipulating silence as notification of acceptance puts an onus on the offeree to do a positive act to reject the offer. Secondly, silence is equivocal and does not therefore objectively signify acceptance. The same is true of specifying a commonplace act to signify acceptance.

It is the writer's view that the act of banking a cheque in full and final satisfaction is by itself equivocal as it could mean more than one thing. It could mean acceptance of the offer as payment in full and final satisfaction, and it could mean that the creditor merely wishes to take the money on account. Further, the onus should not be on the offeree to do a positive act to signify his rejection of the offer, as many of the cases, including Homeguard specify.

This paper will then examine the consideration or "satisfaction" required to support such an accord and satisfaction. In particular this paper will examine the existing case law which specifies that settlement of a bona fide dispute affords consideration; whether there is consideration when a debtor merely pays a liquidated or undisputed portion of the debt and whether consideration in fact should be sufficient as one recent English Court of Appeal case has suggested. This paper will then examine the doctrine of promissory estoppel as it applies and has been considered in the cases on cheques tendered in full and final satisfaction and the doctrine of waiver. These are doctrines in which no consideration is necessary but specific other requirements need to be complied with. In doing so, this paper will attempt to show that in many of the cases in the area of cheques tendered in full and final satisfaction there has been insufficient consideration to support a finding that an accord and satisfaction has come into being.

This paper will then examine section 21(2)(b) of the Bills of Exchange Act 1908 which was put forward as an alternative reason by Mahon J. for the finding in Homeguard, in support of the proposition that a creditor is deemed to have accepted an offer of a cheque tendered in full and final satisfaction when the same is banked. Mahon J. stated that this section provides that a cheque may be tendered on a condition. He held that if the cheque was banked and the condition repudiated, then the tort of conversion of the cheque had been committed and the offeree could not assert his own wrong, and was therefore estopped from denying that he had banked the cheque in accordance with the condition. This paper will

⁵[1862] 11 CB(Nes) 869; affirmed (1863) New Rep. 401.

examine such argument to ascertain whether such affords a separate cause of action and whether conversion in such circumstances has been committed, and if so, the consequences of the same.

This paper will then examine section 92 of the Judicature Act 1908 which is a statutory exception to the rule that a sum tendered in payment as full and final satisfaction of a larger amount which is owing, and which is undisputed and liquidated affords no consideration, and therefore no binding contract.

In closing, this paper will examine the policy considerations inherent in any rule. The rule in Homeguard even if wrong in principle had the benefit of certainty of application. The law in its present state is not only not in accordance with basic principles but affords no certainty to the parties.

The rule in Homeguard placed a greater onus on the creditor. The traditional common law rule placed a higher onus on the debtor. This paper will examine the policy considerations to determine on which party such onus should rest. In doing so, this paper will examine the situation in the United States of America, which is the reverse of the common law position in New Zealand.

The writer had originally hoped to examine the common law decisions in Australia and England subsequent to the decision in Homeguard. The case law prior to Homeguard has been dealt with thoroughly by Professor D.W. McLauchlan in his paper Cheques in Full and Final Satisfaction: accord despite discord?⁶ However, despite a thorough search for the same the writer has been unable to turn up any decisions of moment.

It will be submitted that if strict common law principles are applied, the result which would be achieved is capable of affording sufficient certainty, as a creditor will never be taken to have assented to the debtor's offer unless he expressly states that he has, or has acted in such a clear unequivocal fashion, that on the balance of probabilities no other reasonable interpretation could be placed on his actions.

⁶(1987) 12 NZULR 259.

2. The Decision in Homeguard Products (NZ) Limited v Kiwi Packaging Limited⁷

This case had humble enough beginnings. A dispute had arisen as to the quantum of a sum owed by Homeguard to Kiwi Packaging for goods supplied to it. On 21 September 1977, Homeguard wrote to Kiwi Packaging asserting that on its calculation the amount outstanding was \$765.97. On 27 September, Kiwi Packaging replied asserting that the final amount owing on the account was \$901.84. On 4 October Homeguard wrote to Kiwi Packaging enclosing a cheque for \$765.97 "in full settlement of our account". Kiwi Packaging banked the cheque some days after the date of the letter but sent no reply. On 15 November Homeguard received a letter from Kiwi Packaging enclosing a purported statement of account as at that date showing a balance of \$1,187.60. The account further showed a credit of \$765.97 described as "October cash"; however, no mention was made of the letter of 4 October.

Kiwi Packaging then sued to recover the balance it alleged was owing. In the Magistrate's Court the learned judge had found as a fact that Kiwi Packaging had received and banked Homeguard's cheque for \$765.97 sent in full settlement of its account and rejected Homeguard's defence of accord and satisfaction. He held that there had been no "meeting of minds" between the two parties. Homeguard appealed.

Mahon J. on appeal reversed the decision of the Magistrates Court and held that the cheque had been forwarded in full satisfaction of the account, it had been banked and its proceeds credited to the account of Homeguard and these events constituted "an irretrievable manifestation of assent" by Kiwi Packaging to the condition upon which the cheque was tendered by Homeguard. Therefore the whole of the debt in whatever amount had become extinguished by an accord and satisfaction. His Honour further held on an alternative or supporting basis that the delivery of the Homeguard cheque fell within Section 21(2)(b) of the Bills of Exchange Act 1908 as being "conditional, and for a special purpose only, and not for the purpose of transferring the property in the bill". He held, that therefore, the property in the cheque could not pass to Kiwi Packaging until it had complied with the condition. His Honour stated that by banking the cheque and then repudiating the condition Kiwi Packaging had converted the cheque, and was therefore precluded from asserting a right to disclaim the condition and to treat the cheque as payment only on account.

Mahon J. stated that there were only two English cases which appeared to be on point. They were the decisions

⁷Supra Note 1

of Neuchatel Asphalte Co. v Barnett⁸ and D & C Builders Ltd v Rees⁹. In doing so, he overlooked a substantial body of Commonwealth authority on the point¹⁰. In particular although Mahon J. cited the English case of Day v Mclea¹¹ he overlooked the significance of this case which is perhaps the leading authority on the issue.

The extensive body of Commonwealth case law in this area, held that in determining whether an offer of a cheque tendered in full and final satisfaction has been accepted, the same is a question of fact, and not of law.

This paper does not propose to canvass the Commonwealth authority on point prior to Homeguard. The same has been extensively dealt with by Professor D.W. McLauchlan in his paper Cheques in Full and Final Satisfaction: accord despite discord?¹². The writer concurs with the learned author's views expressed therein.

Mahon J. in Homeguard, although paying lip service to the principle that in determining whether such offer has been accepted, the dispute is "essentially a question of fact"¹³, appeared to be giving such the status of a presumption of law. His Honour found that the rule in America in such cases reflected the law of England and New Zealand¹⁴. The common law in the United States of America in such cases dictates that such is a question of law. It dictates that in such circumstances as a matter of law when the creditor banks such a cheque, an accord and satisfaction is complete and the creditor is unable to sue for the balance of the debt, notwithstanding that he may expressly state at the time of banking the cheque that he does not accept the condition upon which it is tendered¹⁵.

However, in the United States a divergence of opinion has arisen as to whether the common law still stands,

⁸[1957] 1 All ER 362; [1957] 1 WLR 356 (CA)

⁹[1966] 2 QB 617; [1965] 3 All ER 837.

¹⁰See Cheques in Full and Final Satisfaction: accord despite discord?, D.W. McLauchlan (1987) 12 NZULR 259.

¹¹[1889] 22 QBD 610

¹²Supra note 10.

¹³Supra Note 1 at page 332 line 1 per Mahon J.

¹⁴Supra note 1 at page 332 line 20

¹⁵Corpus Juris Secundum (a contemporary statement of American law as derived from reported cases and legislation) volume 1, para 54 at page 540.

following the adoption of the Uniform Commercial Code (in particular section 1-207) by the majority of States in 1968. This section states in effect that a party who assents to performance or actually performs in the manner prescribed or demanded by the other party does not thereby prejudice his rights if he reserves the same with such words as "without prejudice", "under pressure" or the like. A handful of the American States have held that this overrides the common rule in relation to cheques banked in full and final satisfaction, and allows a creditor to bank a cheque tendered on such condition and ignore the condition and sue for the balance. This will be dealt with more fully in chapter 9 of this paper.

It is submitted, therefore, that in equating English and New Zealand law to American law, Mahon J. not only failed to follow a substantial body of Commonwealth case law, but further failed to identify and apply the common law principles in relation to what constitutes acceptance. As a general rule, acceptance to be complete needs to be communicated to the offeree. This may be by words or by conduct. The question Mahon J. should have been addressing was whether simply banking the cheque tendered in full settlement, amounted to conduct which a reasonable person in the shoes of the offeror would infer to mean acceptance of his offer. It is submitted, for reasons which will be enlarged upon later in this paper, that merely banking a cheque without more is insufficient conduct to amount to communication of acceptance to the offeror.

It is interesting to note, that Mahon J. considered himself to be correctly applying legal principles when he held that the United States' law reflected the law of England and New Zealand. In doing so, however, instead of applying the contractual principles mentioned earlier, he applied the principle in the landlord and tenant case of Croft v Lumley¹⁶. In this case it was held that a landlord will be estopped from setting up forfeiture of a lease if he had, with knowledge of all the relevant facts, accepted from the tenant a sum of money as rent for any period following the event giving the right of forfeiture.

In Croft v Lumley, a dispute had arisen as to whether or not the lease was liable to forfeiture. During the negotiations which ensued, the tenant (by his agent) handed to the landlord (by his agent), a sum of money representing half a year's rent. The landlord replied that he would not receive the money as rent, but only as compensation for occupation after forfeiture, and without prejudice to his rights of re-entry. However, the tenant insisted that the money be only tendered on the basis that

¹⁶(1858) 6 HL Cas 672; 10 ER 1459.

it be received unconditionally as rent due and that the landlord must "take it or leave it". The landlord took the money and held it to his credit, but insisted he had not received it as rent.

Professor D.W. McLauchlan¹⁷ states that Croft v Lumley is merely one of a number of landlord and tenant cases which played an important part in the development in the latter part of the nineteenth century of a complex body of law known as the doctrine of election.

The learned author states of such doctrine¹⁸:

"In outline, that doctrine provides that where a person in his dealings with another is faced with making a choice between two alternatives and inconsistent rights, then the choice once made is irrevocable and the other alternative right is extinguished."

This case is interesting, as although the doctrine of election is undoubtedly a separate doctrine, the principles in relation to when a party is deemed to have made the choice between two alternatives are not altogether different in principle. The difference appears to be merely one of policy made by the courts. As Professor McLauchlan states a feature of the doctrine of election which is exemplified in this case is that in deciding whether conduct amounts to an election the courts have always adopted a hostile attitude to attempts to exercise contractual rights coupled with a disclaimer as to an intention to affirm the contract.¹⁹

Mahon J. then went on to expressly hold that in the absence of evidence of misrepresentation or induced mistake which might afford relief to the respondent in law or in equity, and in the absence of any other relevant evidence which could go to qualify the creditor's conduct²⁰:

"... the inference must be inevitable that the cheque was banked in conformity with the condition by which it was accompanied. The presence of the condition must necessarily be clearly proved and the banking of the cheque must be shown to have been an informed and

¹⁷Supra note 10.

¹⁸Supra note 10 at page 279.

¹⁹Supra note 10 at page 279.

²⁰Supra note 1 at page 333 lines 14-20.

voluntary act, for it represents acceptance of the cheque as opposed to its mere receipt."

The reference to "other relevant evidence" and the fact that Mahon J. states that the banking of the cheque must be shown to have been an informed and voluntary act would on the face of it suggest that for instance a flat rejection of the condition communicated to the debtor would be such evidence. However, the judgment as a whole, leaves the impression that Mahon J. felt that a creditor could not bank the cheque and reject the condition upon which it was offered. This, it is submitted, is strengthened by his view that it was important that there was no evidence of misrepresentation or induced mistake. Both these doctrines, are doctrines of relief, which can be afforded to the party, after a contract has come into being.

Mahon J. also canvassed the criticism which has been levied at the rule in Foakes v Beer²¹ that payment of a lesser sum in the place of a larger undisputed and liquidated sum affords no consideration. In doing so he examined section 92 of the Judicature Act 1908, which is a statutory exception to such rule. This will be dealt with more fully in Chapter 8 of this paper. His Honour then examined the appellant's alternative argument of promissory estoppel. Mahon J. stated that his first objection to the use of promissory estoppel in such circumstances was that it had not yet been sanctioned by the House of Lords and bypassed the common law rule which required consideration to be afforded. It is submitted that Mahon J.'s latter concern is unfounded and the doctrine of consideration and promissory estoppel can happily co-exist.

His Honour's second objection regarding the use of promissory estoppel was that the High Trees²² decision which was the decision which founded or "revived" such doctrine related to an agreement before the monetary liability became due and Spencer Bower and Turner on Estoppel by Representation²³ had expressed the view that estoppel could not be applied so as to negate the result which would accrue in a Foakes v Beer situation. It is submitted that such distinction is unreal and unnecessarily prohibitive. These points will be dealt with more fully in Chapter 5(d) of this paper.

²¹(1884) 9 AC 605.

²²Central London Property Trust v High Trees [1947] 1 KB 130.

²³3rd edition, 1977, at pp. 398-399.

Mahon J. went on to assert what he states to be "an additional ground"²⁴ to support his conclusion that an accord and satisfaction had been effected. He felt such additional support came from section 21(2)(b) of the Bills of Exchange Act 1908²⁵. Mahon J. stated that the terms of delivery of Homeguard's cheque fell within section 21(2)(b) of the Bills of Exchange Act 1908 as such was "conditional, or for a special purpose only, and not for the purpose of transferring the property in the bill". He held that it therefore followed that the property in the cheque could not pass to Kiwi Packaging until it had complied with the condition. He held that by banking the cheque and then repudiating the condition, Kiwi Packaging had in his opinion converted the cheque. His Honour stated:²⁶

"Thus it might be said that the respondent is precluded from asserting any right to disclaim the condition and to treat the cheque only as a payment on account, for it could only adopt that course by committing against the appellant the tort of conversion."

Mahon J.'s reasoning of his "additional ground" he afforded only one paragraph in his judgment. Greig J., convincingly argued in the High Court decision of James Cook Hotel Limited v Canx Corporate Services Limited,²⁷ that such section is merely concerned with the delivery of a bill of exchange, and is merely a rule of procedure or evidence, not a rule of substantive law. It allows evidence to be given, that the delivery or transfer of the bill of exchange was not for the purpose of transferring the property in the bill, but was for some other purpose. He states a typical example of which would be the transfer in escrow or a payment on some other condition which means that the bill is not delivered and is otherwise incomplete. This will be dealt with more fully in Chapter 6 of this paper. It is sufficient at this point to say, that the brief consideration of Mahon J. of this point, appears to suggest that he merely intended such argument to add additional support to his main, and fully argued proposition on accord and satisfaction.

The decision in Homeguard, by Mahon J., appears to have created a great flurry of activity by debtors, if the

²⁴Supra note 1 at page 333 line 36.

²⁵This will be dealt with more fully in Chapter 6 of this paper.

²⁶supra note 1 at page 333, lines 49-51

²⁷[1989] 3 NZLR 213

frequency of the cases is anything to go by, in forwarding to creditors with whom they had a dispute, and indeed some with whom they didn't, a cheque in full and final satisfaction. One tends to suspect from a great number of the cases subsequent to Homeguard, that such is not so much the process of the law following standard commercial practice, but commercial practice following the law. Indeed, the law as laid down by the decision in Homeguard would seem from the writer's experience in practice to be the most publicly-known case.

This paper now proposes to examine the common law principles which apply when one is determining whether an accord and satisfaction has resulted, and will then attempt to show that the decision in Homeguard, and many of the decisions prior to it, are not in accordance with such principles.

3 What type of contract is involved when a cheque is "accepted" in full and final satisfaction of a claim.

At common law, there are two "types" of contract. These are known as "unilateral contracts" and "bilateral contracts". Unilateral contracts can be formed in one of two ways. The most common type of unilateral contract is that of an offer in exchange for an act. In this situation the consideration supplied by the offeror is the promise contained in his offer, and the consideration supplied by the offeree is the doing of the requested act. The doing of the requested act also signifies acceptance of the offer.

The most famous case concerning a unilateral contract is that of Carlill v Carbolic Smoke Ball Company²⁸. In this case the Carbolic Smoke Ball Company advertised that they would pay £100 reward to anyone who caught influenza after having used a smokeball three times daily for two weeks according to the directions supplied with each smokeball. Mrs Carlill used the ball as prescribed and then caught influenza. The English Court of Appeal held that a unilateral contract had been formed. This was as the act requested and the consideration supplied by her was the use of the smokeball three times daily for two weeks. The Court held that as soon as she had completed that act she had a contract with the Company which continued as long as she persisted in using the smokeball as directed. The Court held that the Company was not obliged to do anything until she caught influenza, but that catching influenza was a condition of its liability not part of the consideration.

Therefore as can be seen in a classic type of unilateral contract communication of acceptance of the offer does not have to be made expressly, but can only be done by performance of the requested act, which itself also constitutes the consideration supplied by the offeree to the offeror.

However, as Anson rightly points out in his textbook Law of Contract²⁹ a unilateral contract may also be formed by an offer of an act in return for a promise. The example he gives is the situation of a person offering goods or services which when accepted bind the acceptor to reward him for them. He gives the illustration of A allowing B to do work for him under such circumstances that no reasonable man would suppose that B meant to do the work for nothing. He states in this situation A will be liable to pay for the work. The doing of the work is the offer;

²⁸(1893) 1 QB 256

²⁹26th edition, 1984, p22.

the permission to do it, or the acquiescence in its being done constitutes the acceptance.

However, although the writer agrees with the learned author that a unilateral contract can indeed be the offer of an act in exchange for a promise, it is submitted that the example given is perhaps not a good one. In all cases when one is considering whether or not an offer has been accepted, such is a question of fact. The question is always one of interpretation of the facts in the particular case. In interpreting the facts, one must ask the question as to whether a reasonable person in the shoes of B, would have understood that his offer was being accepted. It is submitted that acquiescence in allowing such an act to be performed is equivocal and therefore not tantamount to acceptance.

In this latter type of unilateral contract, communication of acceptance of the offer to the offeror is needed before the contract is completed. This communication may be by words or conduct. In the first type of unilateral contract, communication of acceptance is taken to be impliedly waived by the offeror³⁰.

In a bilateral contract such contract consists of an exchange of promises. The offeror makes promises to the offeree in return for promises to himself which he requests from the offeree. In such situation there is a general presumption that the offeree must communicate his acceptance of the offer to offeror before a contract comes into existence³¹.

It is a difficult question of interpretation to decide whether the typical scenario of a cheque being forwarded in full and final satisfaction of a dispute and being "accepted" by the creditor is a unilateral or a bilateral contract.

One possible interpretation is that such is a unilateral contract of the latter variety. That is an offer of the act of payment, in return for a promise to forbear to sue for the balance of the claim. If it was such a unilateral contract, then the same would not be complete until payment had actually been received on the cheque. That is executed consideration on the part of the offeror would be required.

Alternatively such could be a bilateral contract in that forwarding of such cheque amounted to a promise of payment in return for a promise to forbear from suing on a claim.

³⁰J.C. Smith The Law of Contract 1989, 1st edition at page 27.

³¹Ibid at page 28.

However, the difference may be one of semantics, as in any event it is usual in either type of contract, that communication of acceptance would need to be provided to the offeror. It is only in the first type of unilateral contract where acceptance is taken to be waived by the offeror. Therefore, it is submitted, that even if the act of payment is performed by the offeror, there would still need to be communication of acceptance of the terms upon which it was proffered. This will be examined more fully in the next chapter.

Assuming for the present purposes that such offer has been accepted, is such accord and satisfaction still incomplete until actual payment, or crediting of the amount of the cheque to the creditor's bank account has been achieved?

Before the latter half of the nineteenth century the original contractual obligation was held not to be discharged by accord and satisfaction until the accord was executed and the agreement to furnish the new consideration had been carried out. As was said in Lynn v Bruce³²:

"Accord executed is satisfaction: accord executory is only substituting one cause of action in the room of another, which might go on to any extent."

Now the question is regarded as one of construction of the agreement. The promise of payment on its own might be the consideration and discharge of the original obligation if it is clear that the parties intended it to be so. If this is so then the original obligation or claim is then discharged from the date the promise is accepted. Therefore, if the promisor fails to perform the promise, the promisee's only remedy is to sue for breach of the promise, and he cannot return to the original obligation or claim.³³

It is submitted, that when one is construing a contract to ascertain whether it was the promise or the act that the other contracting party was bargained for, that the same should be construed in the manner which one would interpret any other type of contract. The idea of parties bargaining for a promise is in itself a legal fiction. It is submitted, that if one asked most contracting parties what it was they had bargained for, they would claim it was the act not the promise. However, in the vast majority of situations it is the other party's contractual promise which supplies consideration for the

³²(1794) 2 Hbl 317 per Eyre LCJ at page 319.

³³Anson's Law of Contract 26th edition by A.G. Guest (1984) Oxford, England.

contract itself; the law of contract being seen as the law which enforces promises.

However, in some situations it is necessary to give effect to the intention of the parties that the consideration be seen as the executed promise or act. This is the usual situation in unilateral contracts of the first variety; that is an offer of a promise in exchange for an act. A common example of the consideration in unilateral contracts of the first variety is seen in the "reward" cases. For example, a man may place an advertisement in a newspaper offering a reward of \$100 to anyone who found his lost dog. Clearly, it would be a nonsense to suggest that a contract would come into effect if a person wrote to the man who had placed the advertisement stating that he would find the man's dog. In this situation, as a matter of interpretation, it is clear that the man who placed the advertisement did not intend to be contractually bound by a person merely promising to do the requested act. What he clearly required in exchange for his offer was the requested act of finding his lost dog.

When one is examining such 'contract' to see if it is of the latter type of unilateral contract; that is the offer of an act in exchange for a promise, the terms of the contract are taken from the terms of the offer, which must be accepted. With the typical scenario of a cheque forwarded in full and final satisfaction, the offer will be contained in the letter which is forwarded with the cheque. Therefore, one has to examine this offer to see whether the offeror is offering the payment itself in return for the promise of the creditor not to sue for the balance or a promise of payment in return for such promise not to sue. As the actual cheque itself is being forwarded with such offer, it could indeed be interpreted that it is the actual payment itself that the debtor is proffering in return for such promise. Indeed, this is the way that the cases to date after Homeguard seem to have interpreted such contract, although, they do not expressly state they are doing so.

In Dunrae Manufacturing Limited v C.L. North & Co. Limited³⁴, a cheque was sent to a creditor in "full and final settlement" of a disputed debt. The cheque was banked by the creditor's office lady without reference to the creditor. The creditor did not become aware of the condition until nearly two years later when action was brought to recover the balance. For several months after the banking of the cheque the creditor had sent out accounts rendered to the debtor for the balance and endeavoured without success to discuss the matter with the

³⁴[1988] 2 NZLR 602.

debtor. Eventually, the creditor issued proceedings in the District Court for recovery of the balance. The debtor pleaded accord and satisfaction.

In the District Court it was found there was no accord and satisfaction, however, this was reversed by Smellie J. on appeal to the High Court. Smellie J. declined to follow Homeguard and held that banking the cheque was not conclusive evidence of accord. However, he found that viewed objectively the banking of the cheque in that case did amount to an acceptance of the debtor's offer to settle.

Smellie J. dealt primarily with the question of whether the offer of part payment in full satisfaction had been accepted. He did not give such detailed analysis to the question of when the consideration or satisfaction had been supplied. His Honour's finding in the third to last paragraph of his judgment supports the view, however, that payment is needed before consideration is supplied. His Honour held³⁵:

"I find as a fact that the conduct of the respondent's agent in banking the cheque amounted to an acceptance of the offer and when the cheque was honoured the accord and satisfaction were complete." (emphasis added)

In Budget Rent-a-Car Limited v Goodman and Alston³⁶, Mr Goodman had hired a rental car from Budget Rent-a-Car. A day after he had hired the car he allowed Mr Alston to drive it, in breach of the hire agreement he had with Budget Rent-a-Car. While Mr Alston was driving the car he had an accident. Summary judgment proceedings were issued against both Mr Goodman and Mr Alston. Mr Alston took no steps in the proceeding and summary judgment was entered against him by default.

Before the summary judgment proceedings were issued, the debt collecting company handling the affairs of Budget Rent-a-Car had written to Mr Goodman claiming reimbursement for the then estimated net cost due to Budget as a result of the accident the previous year. Mr Goodman's solicitors had written back saying in effect that Mr Goodman had only just completed his University studies and was in straitened financial circumstances and therefore had no assets to meet Budget's claim and might even fact bankruptcy were the claim to be enforced against him. The amount in dispute was approximately \$10,000.

³⁵Ibid at page 607.

³⁶Unreported, High Court Wellington, Master Williams, 13 November 1990.

Mr Goodman's solicitor in the same letter offered Budget's credit controllers the sum of \$5,000 in full and final settlement payable in one lump sum.

There was then some further correspondence, as Budget's debt collecting agency seemed to have misunderstood the terms of the offer. Finally on 28 July 1989 Mr Goodman's solicitors wrote again to Budget's debt collector a letter almost identical to their previous one outlining the tight financial circumstances in which Mr Goodman found himself and enclosing their trust account for \$5,000 "in full and final settlement of your client's claim".

On 7 August the debt collectors for Budget wrote back a letter which showed that their solicitors had been reading the recent High Court decisions on cheques forwarded in full and final satisfaction and stated as follows:

"Our solicitors have advised us that recent High Court decisions make it clear we are entitled to reject the basis of tender and accept the cheque on account. Full settlement depends on accord and satisfaction, and you certainly do not have such an agreement from us.

Accordingly, we have receipted the cheque and intend to proceed against your client for the balance."

At the summary judgment hearing, Mr Goodman raised the defence of accord and satisfaction. Master Williams not surprisingly held that there was no dispute in the present instance as to liability to pay had never been questioned and held therefore that Mr Goodman had afforded no consideration by such payment.

However, notwithstanding this finding, Master Williams went on to consider whether actual payment on the cheque was necessary to provide the consideration in such accord and satisfaction, although not expressly stating that he was doing so. He stated at page 11:

"It is clear from the authorities in the general law that payment is not received until a cheque is banked and cleared. It follows that payment was not received by Budget or its agents until 8 August or later by which stage it had, or possibly, was in the process of advising Mr Goodman through his solicitors that it did not accept the cheque in full settlement of his obligations and indeed that it intended to sue him for the balance.

In those circumstances, this court is of the view that it could not be said that the banking

of the cheque amounted to the irretrievable manifestation of assent such as the cases require in order to constitute accord and satisfaction."

One possible interpretation of what Master Williams was saying, would be that he was impliedly holding that such was a unilateral contract of the second variety, and was therefore not effected until the consideration had been supplied by the offeror, the consideration being the act of payment and not merely the promise to pay. His Honour seems to be saying that if payment has not been received upon banking (which indeed it could not be) then the banking of the cheque could not amount to an irretrievable manifestation of assent, and before payment Budget or its agents had notified Mr Goodman through his solicitors that it did not accept the cheque on the basis tendered.

In DFC New Zealand Limited & Anor v Wellington City Council³⁷, summary judgment proceedings were issued by the plaintiff against the Wellington City Council seeking specific performance from the City Council to do all things necessary to enable a title to issue to the ballroom forming part of the Plaza International Hotel complex in Wellington. DFC was the financier of the Plaza Hotel, and the land to the rear of the Plaza was owned by the Wellington City Council.

The Wellington City Council had agreed to sell air space in a proposed car park to Forum on a planned subdivision. A dispute had arisen between the Wellington City Council and Forum and the balance of purchase money due to the City Council under this agreement was left outstanding.

DFC was concerned, as due to the dispute and the City Council withholding the title, DFC could not register its first mortgage over the property. DFC decided to pay the balance outstanding to the City Council and therefore allow the unit title to the ballroom to issue so that the mortgage could be registered.

The solicitor for DFC, Mr Shillson, spoke to Mr Jones, the solicitor for the Wellington City Council. He outlined the situation and said that DFC wanted the subdivision to proceed and would pay the money on the following conditions:

1. That such payment was to be without prejudice to the Wellington City Council and Forum's argument over the amount outstanding.

³⁷Unreported, High Court Wellington, Master Williams, 13 September 1990.

2. That the subdivision would proceed forthwith and that any requisitions would be satisfied promptly.

Mr Shillson said that Mr Jones acknowledged that he understood DFC's view and sent him a copy of the settlement statement which had been sent to Forum showing the balance required to settle as at 10 July 1989 at \$269,337.55.

However after this date and prior to 22 September 1989 Mr Jones had received a memorandum from the Economic and Business Development Unit of the Council asking for the title to be withheld or cash reserves maintained.

On 22 September 1989 Mr Shillson called to see Mr Jones and explained and confirmed the conditions on which the cheque was tendered and handed him the cheque for \$278,620.67 which was the balance required to settle on that date inclusive of interest for late settlement. At the same time he presented Mr Jones with a letter which recited that DFC felt it necessary to pay the money to complete the acquisition by Forum, that it was without prejudice to Forum's arguments with the Council and that it was done in order to facilitate the acquisition by Forum of the airspace above the Council car park.

The City Council paid DFC's cheque into its account and it was collected by way of a debit to DFC's bank statement the day it was handed over.

Towards the end of March 1990 Mr Shillson spoke with Mr Jones and was told that the latter had all the documents in hand but they "would not be lodged until defects in the Betty Campbell complex had been remedied".

As can be seen, this is not strictly the scenario, as in previous cases, of a cheque being proffered on the basis that it be taken in full and final satisfaction of a disputed claim. However, although not considered strictly relevant the cases on cheques proffered in full and final satisfaction were considered by Master Williams in his judgment. Further, as stated earlier the case law on cheques in full and final satisfaction is merely an application of the principles of accord and satisfaction, which is itself a peculiar type of contract.

The case is interesting due to the way that DFC pleaded its two causes of action. Firstly, it pleaded a contract, which on analysis would seem to be the second type of unilateral contract, that is an offer of an act in exchange for a promise. It pleaded it in the following way:

"In consideration of the first plaintiff discharging the obligation of Forum under the

Airspace Agreement the Council agreed, by accepting the cheque on the terms tendered, to lodge all documents relating to the subdivision of the airspace with the District Land Registrar at Wellington and satisfy any requisitions relating to the deposit promptly."³⁸

The word "discharging" infers that such act, that of payment, must actually have to be done, in order for the consideration to be provided.

In the alternative, DFC pleaded that its cheque was tendered to the Wellington City Council on the basis that if the Council accepted the cheque it would accept the obligation set out in the letter. This was essentially an argument concerned with conditional payment under section 21(2)(b) of the Bills of Exchange Act 1908 and will be dealt with later on in this paper.

Unfortunately, Master Williams did not consider this first argument in any detail. He stated³⁹:

"There is, in this Court's view, little difference in whichever approach is adopted."

He held further, somewhat unhelpfully, that⁴⁰:

"... it is clear that the City Council is in breach of its contract with DFC and that DFC is entitled to an order for specific performance requiring the City Council to comply with its obligations 'to lodge all documents relating to the subdivision... and that any requisitions in relation to the deposit be satisfied promptly' or that the cheque was tendered and accepted on those conditions and that the City Council is bound thereby."

In Webster Developments Limited (in Receivership and in Liquidation) v J.A.J. Bassili and Another⁴¹, the claim was for arrears of rent and other payments due under a deed of lease, by the defendants as guarantors of the lease.

On 3 July 1989 the solicitors for the lessee wrote to the solicitors for the lessor concerning the agreement as to the rent. The letter went on to inquire whether the

³⁸Ibid at page 16.

³⁹Ibid at page 17.

⁴⁰Ibid at page 18.

⁴¹Unreported, High Court Auckland, Hillyer J., 27 September 1991.

lessor would be prepared to surrender the existing lease on certain terms. It was suggested that there were overpayments of rental and the letter outlined other considerations and in closing offered to pay a further \$5,000 immediately in full settlement of such surrender.

Subsequently receivers were appointed to the lessors. On 18 August the solicitor for the lessee wrote to the receivers enclosing a copy of the earlier letter and asking for the matters therein to be considered and to let them have their thoughts on the same as soon possible.

On 28 September 1989 no response had been received so the solicitors for the lessees once more wrote to the receivers noting that they had not heard from them since their letter of 18 August. They further stated:⁴²

"We presume that the offer made in that letter is acceptable and therefore enclose our cheque for FIVE THOUSAND DOLLARS in full settlement of our client's obligation to Webster Developments Limited in terms of the leases dated 3 July 1985 and expiring respectively on 8 April 1990 and 22 May 1990.

Please note that your receipt of the enclosed cheque is only accepted on the basis set out above."

This cheque was not banked. Subsequent statements were sent by the plaintiff to the defendant outlining the monies owing, and the solicitors for the defendant wrote back saying that some two months ago they had paid to the receivers in full and final settlement a cheque for \$5,000 for all monies owing under the lease.

On 6 December the solicitors for the receivers wrote back to the solicitors for the lessees returning the cheque and saying that it was not accepted in full and final settlement as tendered and further stating that a Section 218 notice had been issued for the arrears.

The cheque proffered had never been presented nor had the receipt attached to it been signed. After further communications this proceeding was issued.

The defendants submitted that an accord and satisfaction had arisen on the basis of the cheque being forwarded and had been held by the receivers for something over two months.

⁴²Ibid at page 4.

Hillyer J. stated that he had dealt with the question of accord and satisfaction in the case of H.B.F. Dalgety Limited v Morton⁴³.

The Plaintiff submitted that there was no dispute and therefore the case of Foakes v Beer⁴⁴ applied and there was no consideration for any agreement by the creditor. Hillyer J. disagreed and held that there was a dispute in the present instance. He reaffirmed his earlier view that when deciding whether there was an accord and satisfaction the question was one of fact. He cited a number of earlier decisions on cheques proffered in full and final satisfaction and said that in all those cases the cheque sent had been banked and "the banking of the cheque had been taken, in the absence of clear indication to the contrary to be acceptance of the offer made, in other words there had been an accord"⁴⁵

Hillyer J. then cited a passage from D. & C. Builders Limited v Rees⁴⁶ where Lord Denning said:

"Now, suppose that the debtor instead of paying the lesser sum in cash, pays it by cheque. He makes out a cheque for the amount. The creditor accepts the cheque and cashes it. Is the position any different? I think not. No sensible distinction can be taken between payment of a lesser sum by cash and payment of it by cheque. The cheque, when given, is conditional payment. When honoured, it is actual payment. It is then just the same as cash. If the creditor is not bound when he receives payment by cash, he should not be bound when he receives payment by cheque."

This case held that payment by cheque afforded no new consideration, as payment by cash would not have. Hillyer J. did not state why he was citing this passage, but it would appear to be in support of a proposition that consideration is not effected until the other party receives payment on the cheque. It is doubtful whether this case in fact affords such principle. Hillyer J. went on to say⁴⁷:

⁴³[1987] 1 NZLR 417.

⁴⁴Supra note 3.

⁴⁵Supra note 43 at page 8.

⁴⁶[1966] 2 QB 617 at 623.

⁴⁷Supra at note 43, page 9.

"Until the cheque is presented the amount cannot be paid. Until the cheque is presented the debt has not been satisfied. As Lord Denning said, the cheque was given as conditional payment, when honoured it is actual payment, it is then just the same as cash. Here therefore, in my view there has not been payment and the retaining of the cheque and the fact that it was not presented would indicate to an independent observer that the offer had not been accepted. There was therefore in my view no agreement between the parties.

Another way of looking at the matter might be to say that the receipt of the cash from the cheque would be the satisfaction which made up the accord and satisfaction. Until the cash was received either by a credit in the account of the person to whom the cheque was sent or by the banknotes being handed over, no payment was made. It was not an actual payment therefore there was no satisfaction even if, which I think would not be the case, the holding of the cheque for a period would amount to accord."

There is therefore an express finding by Hillyer J. that satisfaction could not have occurred until actual payment was received on the cheque. He stated that he was conscious that in a number of cases the failure to advise the offeror over a period that the offer had not been accepted in full satisfaction amounted to an accord but he stated all those cases were ones in which the cheque had been cashed or banked. Therefore, the defendant's plea of accord and satisfaction failed.

Therefore to date in the relatively few cases which have considered whether expressly or impliedly the question as to whether it is executed consideration, that is payment, which is necessary before an accord and satisfaction is complete or merely the promise to pay which effects the satisfaction, the Courts have found the former to be the case.

Although, as submitted earlier the question is one of construction of the particular agreement, it is submitted that in the majority of cases the most reasonable interpretation would be that the creditor had bargained on payment, and not merely the promise to pay. This is, as a contract's terms are contained in the offer, the acceptance being mere agreement to those terms. In the typical case of a cheque proffered in full and final satisfaction, the offer would be contained in the letter sent with the cheque. The fact that the cheque is sent with the letter, thereby placing the means of payment in the creditor's hands, would lead, it is submitted, to the reasonable interpretation that it was the actual payment

that was being offered and not merely a promise to pay.

Therefore, it is submitted, that the typical scenario of a cheque being proffered and "accepted" in full and final satisfaction of a disputed or an unliquidated claim is an example of a unilateral contract of the latter variety. That is the offer of an act of payment in exchange for a promise to forbear from suing for the balance.

4. Agreement

In the previous chapter, this paper examined what type of contract was involved when the cheque was "accepted" in full and final satisfaction of a dispute. This chapter proposes to examine the phenomenon of "agreement" necessary in such an accord and satisfaction. For, in order for there to be an accord, there needs to be an offer and an acceptance. Despite the implicit finding in Homeguard the question as to whether or not there is acceptance is a question of fact not law⁴⁸.

Since at least 1477 it has been the common law in England and subsequently in New Zealand, that acceptance of an offer needs to be communicated to the offeror before the same is effective. That is⁴⁹:

"There must be an external manifestation of assent, some spoken word or acts done by the offeree or by his authorised agent which the law can regard as the communication of the acceptance of the offer."

The oldest case reported on such point appears to be the case in the Yearbooks of Anon⁵⁰. It was argued in that case that where the produce of a field was offered to a man at a certain price, if he was pleased with it on inspection, the contract was made and the property passed when he had seen and approved the subject of the sale. But Brian C.J. said⁵¹:

"It seems to me that the plea is not good without showing that you had certified the other of his pleasure, for it is trite learning that the thought of a man is not triable, for the devil himself knows not the thought of a man; but if you had agreed that if the bargain pleased then you should have signified it to such an one, then I grant you need not have done more, for it is a matter of fact."

This dictum was approved by Lord Blackburn in the case of Brogden v Metropolitan Railway Company⁵² in support of the

⁴⁸Day v McLea (1889) 22 QBD 610.

⁴⁹Cheshire and Fifoot Law of Contract (1988), 7th edition, at page 56.

⁵⁰(1477) YB Pasch 17 Edw 4, F.1, pl2.

⁵¹Ibid at pp.34-35.

⁵²(1877) 2 App. Cas. 666.

rule that a contract is formed not with the acceptor has made up his mind to accept, but when he has done something to signify his intention to accept.

The main reason for the rule that acceptance is incomplete until it is communicated is that it would cause hardship to an offeror if he were bound by his offer without knowing that his offer had been accepted⁵³.

Acceptance need not necessarily be expressed in words, it may be expressed by conduct. But conduct will only amount to acceptance if it is clear that the offeree did the act with the intention (actual or apparent) of accepting the offer⁵⁴. Further an offeror may waive the means of communication of acceptance:

"He may himself run the risk of incurring an obligation but he may not impose it on another."⁵⁵

This waiver may be expressed or inferred from the terms of the offer. It is normally assumed the need for communication of acceptance is waived in the first type of unilateral contract. That is an offer of a promise in return for an act. It can also be taken to be waived in bilateral contracts. An example of the same is found in the case of Brogden v Metropolitan Railway Company⁵⁶. In this case it was said that if a man:

"...sent an offer abroad saying: I wish to know whether you will supply me with goods at such and such a price, and, if you agree to that you must ship the first cargo as soon as you get this letter, there can be no doubt that as soon as the cargo was shipped the contract would be complete."

Further an offeror may specify the doing of a certain act to signify acceptance. For instance an offeror may state that if the offeree is to accept the offer he must stop at the end of the street and wave a flag three times.

However, the above mentioned principles that an offeror may waive the need for communication, and that he may

⁵³Treitel The Law of Contract 7th edition, 1987, at page 18; Chitty on Contract 26th edition volume 1 1989.

⁵⁴"Chitty on Contracts", 1989, 26th ed.

⁵⁵Cheshire and Fifoot The Law of Contract supra note 49 at page 57.

⁵⁶Supra note 52 at page 691.

specify a certain act to signify acceptance, are subject to the following rule. It is that the offeror cannot stipulate silence to mean acceptance, nor can he stipulate a commonplace act to signify acceptance⁵⁷. The rationale for this rule is identical and can be traced back to the decision of Felthouse v Bindley⁵⁸. The facts of that case were as follows: Felthouse had offered by letter to buy his nephew's horse for £30 15s. adding 'if I hear no more about it I shall consider the horse mine at £30 15s'. No answer was returned to this letter, but the nephew told Bindley, an auctioneer, to keep the horse out of the sale of his farm stock, as he intended to reserve it for his uncle Felthouse. Bindley sold the horse by mistake, and Felthouse sued him for conversion of his property.

The court held that as the nephew had not signified to Felthouse his acceptance of the offer before the auction took place, no contract had been effected, and therefore conversion could not occur. Willes J. said⁵⁹:

"It is clear that the uncle had no right to impose upon the nephew a sale of his horse for £30 15s unless he chose to comply with the condition of writing to repudiate the offer."

The rationale for the rule that an offeror cannot stipulate silence to mean acceptance nor can he stipulate a commonplace act to mean acceptance is, that the offeror has no right to impose an onus on the offeree to signify his non-acceptance of the offer. Secondly, it is submitted, silence and a commonplace act can be equivocal, even if specified to signify acceptance by the offeror. This is as such could signify acceptance of the offer, or in the case of silence it could signify that the offeree had not got round to, or could not be bothered replying to the offer. Similarly a commonplace act could signify acceptance, or that the offeree was merely doing such commonplace act as he would have in any event.

However, although it is settled law that an offeree can stipulate the manner of acceptance, it is submitted that it would be running counter to principle to say he could stipulate the manner of rejection, as this would be tantamount to equating silence or the failure to do an act with acceptance and would therefore run counter to the rule in Felthouse v Bindley that a person cannot stipulate

⁵⁷J.C. Smith The Law of Contract 1989, 1st ed. at page 29.

⁵⁸Supra note 5.

⁵⁹Supra note 5 at page 875.

silence to indicate acceptance as there should be no onus on the offeree to reject the offer.⁶⁰

It is submitted, that in many of the cases after Homeguard, the court has overlooked the rule that silence cannot amount to acceptance even if specified to signify acceptance, and that likewise a commonplace act cannot be specified to specify acceptance. In doing so, the courts have further overlooked the rationale behind such rule which is that such is equivocal and secondly that there should be no onus on the offeree to reject an offer. This reinforces the further rule that communication of acceptance needs to be made to the offeror before such offer is accepted, such communication being by words or conduct, but being sufficiently clear and unequivocal that a reasonable person in the shoes of the offeror would take such to signify acceptance.

Anson⁶¹ states that acceptance may be inferred where the offeree takes the benefit of an offered performance which he has had a reasonable opportunity to reject. The learned author gives the example that if the offeror sends an unsolicited pot of jam to the offeree in circumstances which show that he expects to be paid for it, he should be able to recover its price if the offeree accepts the benefit of his performance by consuming the jam.

However, it is submitted, what if the offeree eats the jam and at the same time says "I am not going to pay for it", surely then no contract can come about as one is not able to infer agreement. Even, in the example given by Anson, surely the eating of the jam itself could be equivocal and the better solution would be to say that the offeror would be entitled to restitution for the value of the jam. This sum would likely equate to the same sum that would have been due under a contract had it been effected, but would have the benefit of not imputing acceptance of an offer on a party, and hence a contract, where it was unclear whether such acceptance existed.

Although, as can be seen, the offeror may impliedly or expressly waive the need for communication of acceptance of his offer, it would seem that in such circumstances that although he, the offeror, cannot assert the existence of a contract against the offeree, the offeree may enforce such contract against the offeror. As was cited earlier:

⁶⁰See Professor J.F. Burrows, Update on Contract 1991, New Zealand Law Society Seminar at page 18.

⁶¹Supra note 29 at page 39.

"He may himself run the risk of incurring an obligation but he may not impose it on another."⁶²

If such is true, then in the case of Felthouse v Bindley⁶³, the nephew could have enforced such contract against his uncle, as the uncle had expressly waived the need for communication of acceptance of the offer, but, the uncle would still be unable to enforce such contract against the nephew.

There is, however, some authority for saying that the offeror cannot any more than the offeree be bound where the offeree simply remains silent in response to an offer and no exceptional circumstances are involved.⁶⁴

In most cases involving cheques proffered in full and final satisfaction of a disputed claim the "acceptance" of the offer of the cheque on the terms it is proffered is never expressly communicated to the offeree. The courts have inferred acceptance either from long periods of silence, or from the fact that the creditor (offeree) has banked the cheque. It is submitted, that in these cases the courts have overlooked the rule, and the rationale behind the rule, that silence cannot signify acceptance, and neither can a commonplace act, even if the offeror expressly stipulates that such will amount to acceptance.

It is submitted, that the act of banking the cheque, is in itself, like silence and a commonplace act, equivocal, as it could mean that the offeree has accepted the cheque on the terms proffered, or just as likely, it could mean that the creditor has taken the cheque on account. It is submitted, that long periods of silence in this regard, by themselves after or before banking cannot aid the court in determining whether the creditor has accepted the cheque on the terms proffered and it is up to the debtor (offeror) to enquire or ascertain from the creditor whether his offer has been accepted.

It is submitted that if the correct common law principles, as expounded, and the theory behind them, were adhered to, this would result in sufficient certainty of application, which the law in its present state lacks. The rule laid down by Mahon J. in Homeguard, although incorrect in principle had the benefit of certainty of application. Some cases have followed Homeguard in holding that banking

⁶²Supra note 55.

⁶³Supra note 5.

⁶⁴Fairline Shipping Corporation v Anderson [1975] QB 180, 189.

the cheque signifies acceptance of the offer at the time of banking. Others have held that long periods of silence with or without banking amount to such acceptance, and in still further cases delays of period of days after banking before the creditor writes back rejecting the offer, have been held to signify acceptance. However, in nearly all these cases, the judges seem to have followed Homeguard in holding that there is an onus on the creditor to reject the offer. Such principle expounded by the courts runs counter to the rationale behind the rule in Felthouse v Bindley⁶⁵ that there should not be an onus placed on the offeree to signify his rejection of the offer, and the principle that acceptance needs to be communicated; whether it be by words or conduct.

The Cases:

Brown v Reardon⁶⁶ concerned a dispute between a farm labourer, Mr Reardon, and his employers, the Browns, over arrears of wages due to the Mr Reardon and \$700 he claimed was owing for the loss of his two dogs shot on the Browns' property. In a letter dated 4 March 1981, Mr Brown's solicitors conceded that some payment was due in respect of wages but denied liability for the shooting of the dogs and threatened to counter-claim for stock allegedly killed by the dogs. In conclusion the letter stated that:

"In the meantime we are instructed without prejudice to offer the within two cheques totalling \$176 in full and final settlement of all claims each might have against the other, in this connection."

Mr Reardon's solicitors replied on 11 March 1981 raising further points about the disputed wages which called for further enquiry and confirmed that the claim for the dogs would be pursued and asked whether they should:

"... return these cheques or can we hold them in anticipation of a further cheque for the balance of our client's claim? Should it be your desire that the cheques be returned, we will be happy to do so on receipt of your further advice."

The only other letter received from Mr Reardon's solicitors before court proceedings were instituted was a reply dated 3 April 1981 advising that their letter had been sent to the Browns for their comments and that they would be contacted once they had received further instructions. No further reply was ever received.

⁶⁵Supra note 5.

⁶⁶[1985] 2 NZLR 530.

On 29 April 1981 Mr Reardon's solicitors wrote to the Browns' solicitors threatening proceedings unless they heard from them within seven days. Then on 19 May, the Reardon solicitors commenced two default actions, and on the same day issued a receipt for the \$176 crediting that amount to Mr Reardon on account of wages and making allowance for the payment in the statement of claim.

The Browns sought to strike out the statement of claim on the basis that an accord and satisfaction had been effected. In the District Court it was held that there had been no accord and satisfaction and the application was dismissed. The Browns then appealed to the High Court.

Casey J. on appeal held on the facts that the correspondence amounted to a modification, of the unequivocal condition about settlement originally imposed by the appellant's solicitors, to an arrangement that the respondent's solicitors could hold the cheques until they replied after seeking further instructions. Casey J. held that their action in banking the cheques was in breach of that arrangement but not of the original terms relating to settlement which were no longer operative.

Casey J., however, stated nothing which could lead to the inference that he dissented at all with the views of Mahon J. in Homeguard. Indeed, like Mahon J. he cited the decision of Croft v Lumley⁶⁷ in support of his view that a⁶⁸:

"... creditor cannot unilaterally alter the basis on which the tender was made and thereby claim there was no meeting of minds when he takes it, as distinct from receiving it."

Although Casey J. seemed to express no dissent from the views of Mahon J. in Homeguard, he reached an entirely different conclusion. With respect, it is submitted that there should be no difference in principle in holding that the cheque was banked in acceptance of the later modified condition, and therefore Homeguard was not in reality distinguishable.

However, Casey J. stated that the appropriation of the cheques in view of the correspondence and the two months of waiting for the promised decision, could not be treated as manifesting the respondent's assent to the terms on which the cheque was originally offered; as had been the case in Homeguard where the terms remained unequivocal between tender and acceptance.

⁶⁷Supra at note 16.

⁶⁸Supra at note 66, p.532 lines 36-38.

In Kirkland v Lindisfarne Landscape Limited⁶⁹ an account had been rendered by Lindisfarne Landscape Limited for preparation and the service of a putting green at a golf course operated by Mr Kirkland. Mr Kirkland had replied by letter to this account on 15 March 1981 complaining it was excessive and pointing out that the company, Lindisfarne, had made a thorough inspection of the work and had estimated its cost would be about \$500 but the account it had levied was for \$1,252.20. The letter enclosed a cheque for \$650 "as final payment". On 21 June 1981 the Company sent Mr Kirkland a letter advising that "we are not able to accept your cheque as full and final settlement but do acknowledge receipt of \$650 as part payment". The cheque for \$650 was presented for payment the next day and duly honoured. Lindisfarne then sued Mr Kirkland for the balance of \$602.20. In the District Court the Judge found that the Company was entitled to succeed and Mr Kirkland appealed.

Vautier J. on appeal expressly followed the decision of Mahon J. in Homeguard and distinguished that of Casey J. in Brown v Reardon⁷⁰. His Honour held that despite the implication in Homeguard the question as to whether there was "agreement" to the terms upon which the cheque was sent was one of fact.

His Honour stated that the District Court Judge's decision that there had been no "meeting of minds" appeared to overlook two important aspects. Firstly His Honour felt that the respondent's letter of 21 June made it completely clear that it was fully aware throughout that the cheque was forwarded on the basis that it was accepted in full settlement. Vautier J. stated secondly that⁷¹:

"... no account seems to have been taken of that fact that established principles as to estoppel would prevent the respondent with a full knowledge of the facts purporting to accept the payment upon a different basis from that on which it was tendered."

Vautier J. further concluded that the respondent by its long silence must obviously have led the appellant to conclude that the offer of settlement was accepted. He further stated that the respondent had ample time to make enquiry to clear up any doubt as to the basis upon which the cheque had been sent.

⁶⁹[1985] 2 NZLR 534.

⁷⁰Supra note 66.

⁷¹Supra note 69 at p.538 lines 21-24.

Finally, His Honour expressly adopted the language in Homeguard and held that the conduct of the respondent constituted an irretrievable manifestation of assent by it to the condition imposed by the appellant.

With respect to the learned judge, the matter, it is submitted, was approached in completely the wrong way. Firstly, as submitted earlier there should be no onus on an offeree to reject an offer. Second, the fact that there was a long silence between the time of offer and that of rejection should be irrelevant for in accordance with Felthouse v Bindley, silence cannot signify acceptance. Thirdly, it is submitted, there are no "established principles as to estoppel" which would prevent payment upon a different basis than that upon which it was tendered. For an estoppel to have arisen there would need to have been conduct on the part of the respondent which led the appellant to believe a certain state of affairs existed. In this case there was a clear representation by the respondent before the cheque was banked that the cheque was not received on the condition upon which it was tendered.

If this case were approached, as it is submitted it should have been on the established principles of offer and acceptance the opposite result would have been achieved. An offer was made and expressly rejected. Therefore it is submitted no accord existed and there could therefore be no accord and satisfaction.

In H.B.F. Dalgety v Morton⁷², Dalgety, a real estate agent, sold a farm for Mr and Mrs Morton. Pursuant to the agency contract, Mr and Mrs Morton became obliged to pay the Real Estate Institute's fee of \$9,768.98, and an invoice for this amount was sent to them.

Two weeks later the Mortons returned the invoice together with a cheque for \$2,450. Mr Morton had written on the invoice "my estimate of costs for a 'work done' basis \$2,450". This cheque was receipted and banked.

At the same time as banking the cheque, Dalgety wrote a letter to the Mortons stating that the cheque was not accepted in full settlement. In due course Dalgety issued a summons claiming the balance of the commission.

In the District Court the Mortons successfully raised a defence of accord and satisfaction. However, on appeal Hillyer J. found the defence of accord and satisfaction failed on three separate grounds. Firstly he found that there was no dispute as the contract was clear and precise as to the amount payable, therefore the case of Foakes v

⁷²[1987] 1 NZLR 411.

Beer⁷³ applied, and there was no consideration for the accord. Secondly he held the statement on the cheque did not make it clear that it was tendered in full and final satisfaction. Thirdly Hillyer J. held that even if there was an offer it was not accepted. His Honour stated that whether or not there was an accord was a question of fact and the letter written by Dalgety made it clear that it did not accept the offer of the cheque tendered in full and final satisfaction.

However, it is submitted, it is implicit in his judgment that Hillyer J. considered that it was necessary for the creditor to write back to the debtor stating he did not accept the cheque on the terms it was offered, and this he seemed to hold by implication must be done at the time of banking. Hillyer J. stated at page 417:

"... but if the creditor does not agree, and if at the time that he accepts the amount he makes it clear to the debtor that he is not accepting it in full satisfaction, it seems to me that it cannot be said that there has been accord and satisfaction." (emphasis added).

In Dunrae Manufacturing Limited v C.L. North and Co Limited⁷⁴, the facts of which have been dealt with earlier⁷⁵, it will be recalled that Smellie J. on appeal declined to follow Homeguard and held that banking of a cheque was not conclusive evidence of accord. However, he did find that viewed objectively the banking of the cheque in that case did amount to an acceptance of the debtor's offer to settle.

His Honour stated further in reference to the District Court Judge's decision that he failed to see how what had been done after the cheque had been banked was relevant, as once an offer had been accepted a contract had come into being.

Although, Smellie J. made no mention of presumptions to be taken from the banking of the cheque, he held that viewed objectively the conduct of the plaintiff's agent in banking the cheque amounted to an acceptance of the offer. He further held that when the cheque was honoured the accord and satisfaction was complete.

This case highlights the difficulties in the reasoning of the cases subsequent to Homeguard which state that they are declining to follow the rationale in Homeguard that

⁷³(1884) 9 App. Cas. 605.

⁷⁴Supra, note 34.

⁷⁵Supra at page 15.

the banking of the cheque amounts to acceptance of the offer. If the banking of the cheque does not by itself amount to acceptance of the offer, then when is the offer deemed to have been accepted? Is it for instance, after two or three days' silence following the banking of the cheque?

In this case Smellie J. took the easy way out, and stated that in the particular circumstances of the case the banking had amounted to acceptance of the offer. However, it is submitted, that this is doubtful, and in reality what led him to this finding was the absence of a rejection of the offer expressly for some two years from the date of banking. If one accepts that, banking of a cheque is in general equivocal and could not by itself be taken to be acceptance of the offer, then long periods of silence following the same cannot due to the rule in Felthouse v Bindley⁷⁶ create such acceptance.

In this case, accounts rendered had been sent out, presumable monthly, after the cheque was banked, and this conduct, it is submitted, was clear evidence, if any is needed, that the offer had not been accepted.

Broadlands Finance Limited v St. John's Motors (Wanganui) Limited⁷⁷ was another appeal from a District Court decision. In this case the appellant (the plaintiff in the District Court) had sued the respondent for damages for breaching an agreement to lease a key-cutting machine.

The respondent had raised many defences, but the one of accord and satisfaction had succeeded in the District Court. The District Court had held that a payment of a cheque offered in full and final satisfaction for \$1,000 in February 1983 had effected an accord and satisfaction. This decision was upheld in the High Court.

In this case there had been a default in payment under the lease agreement and the appellant had repossessed the machine. There then arose a dispute as to the amount payable under the lease, and some correspondence about possible settlement ensued.

Subsequently a letter was sent explaining the respondent's view as to how the net liability was to be calculated. The letter further contained an offer to settle the dispute for \$1,000, and enclosed a cheque for the same. The letter finally said:

⁷⁶Supra note 5.

⁷⁷Unreported, High Court Wanganui, Greig J., 14 March 1988.

"We enclose herewith our cheque for \$1,000 on the explicit understanding that it is either to be accepted by you in full and final settlement of this claim or else returned to us."

On 21 February 1983 the letter and cheque were received by the appellant and dealt with by its clerk in the administration department. Evidence was given which was not disputed that the person dealing with the cheque did not read the letter attached to it, and the cheque was simply removed from the letter and banked to the account of the respondent. There was no evidence as to when the cheque was banked.

On 23 February the letter was received by Mr Brook, who was horrified when he read its last sentence. He wrote a reply which was dated 25 February. This was a Friday which meant that the letter could not have reached the appellant's office until Monday 27 February.

In this letter Mr Brook stated he did not accept the offer of the cheque for \$1,000 in full settlement of the dispute, and advised that the same had been receipted in error. He suggested that the respondent:

1. Reverse the cheque, or
2. Treat it as part payment, or
3. They would refund the \$1,000 in exchange for full settlement.

There was no further communication until 19 May 1983 when the respondent's solicitors wrote to the appellant referring to a letter not produced and demanding return of the \$1,000. The appellant's solicitors refused to do so in their letter of 24 May 1983.

It is significant, that there was no dispute between counsel for appellant and respondent that Mahon J. had correctly expressed the relevant principles in Homeguard as to how the question of accord and satisfaction was to be decided. However, Greig J. stated of Homeguard that⁷⁸:

"With respect, I agree that puts the matter in the clearest way in a case such as this."

Greig J. held that in the circumstances, in the face of the explicit conditions in the letter of 18 February, the dealings with the cheque in receiving it, crediting it to the respondent's account with the appellant and banking it, were enough to amount to an informed and voluntary acceptance of the money.

⁷⁸Ibid at page 5.

The appellant argued that Mr Brook's letter of 25 February was an explicit declaration that the appellant did not accept the payment in full satisfaction. He submitted further that the invitation to reverse the cheque was equal to its return. Greig J. stated⁷⁹:

"As to the latter point that cannot be right even assuming there was time to act effectively. Stopping a cheque requires some action by the drawer and, as I believe, payment of a fee. It cannot be the same as the passive receipt of the return of the cheque or the money."

This reasoning clearly runs counter to the rationale behind the rule in Felthouse v Bindley⁸⁰ that you cannot place the onus on an offeree to reject the offer. Further, this case goes further and states that the reverse is true, and an onus cannot be placed on the offeror to do a positive act.

Greig J. touched on the unreasonableness of such a rule as he was promulgating. He stated⁸¹:

"It may seem that this rule and its application has a stringency which borders on the unreasonable when there is on the one hand a clear rejection of the proposed settlement and suggested alternatives which do not on their face disadvantage the debtor. The point, however, is that the payer is entitled in this situation to impose the terms on which payment is tendered and the payee must comply strictly or risk the consequences."

However, although it is true that the offeror is entitled to specify the terms upon which his offer is to be accepted, Greig J. is ignoring the rule in Felthouse v Bindley that one cannot specify silence to signify acceptance, as the same is equivocal, and cannot signify acceptance. It is submitted, that banking of a cheque is also equivocal. This does not mean in such situations that the offeror is left without a remedy, but that remedy should be restitution or conversion for the value of the cheque, rather than imposing agreement on the parties where it is probable and indeed often clear, that none existed.

⁷⁹Ibid at page 6.

⁸⁰Supra note 5.

⁸¹Supra note 77 at page 7.

In Parmenter v Carter⁸², the plaintiff was suing on a guarantee. The defendant raised a defence of accord and satisfaction. On 4 May 1988 the defendant had forwarded to Rudd Watts and Stone a cheque for \$1,000 in full satisfaction of this proceeding. This was the first time the defendant had indicated any evidence of wishing to settle the matter.

It had been banked by the office system on 5 May, and passed through the account on 10 May. Inquiries had been made prior to the hearing but the plaintiff had been unable to find the person who had banked the cheque.

On 24 May Rudd Watts wrote to the defendant advising that they had made an error in banking the cheque.

Master Gambrill canvassed the recent case law concerning cheques proffered in full satisfaction. She held on the facts that "the defendant was induced to believe a settlement had been made"⁸³

Master Gambrill concurred with Smellie J. in Dunrae⁸⁴ that the subsequent events in the letter maintaining there had been a mistake were not a basis on which the plaintiff was entitled to rely. She stated further:⁸⁵

"The relevant facts to establish accord and satisfaction are before me in respect of receipt of the cheque and the fact that the plaintiff took no further steps at the time of receipt to amend what they now say is their error."
(emphasis added)

Therefore the defence of accord and satisfaction was found to be reasonably arguable and the summary judgment application was dismissed.

As can be seen from this case, the Master felt the fact of banking, without the plaintiff taking further steps at the time of banking was sufficient to amount to acceptance of the offer. As stated above, this runs counter to the rationale behind the rule in Felthouse v Bindley that there should be no onus on the offeree to signify his rejection of the offer. Further, it overlooked the rule that acceptance of an offer needs to be communicated either expressly or by conduct. Again, it is submitted

⁸²Unreported, High Court Auckland, Master Anne Gambrill 15 August 1988.

⁸³Ibid at page 11.

⁸⁴Supra note 77.

⁸⁵Ibid.

that banking the cheque without more is equivocal and therefore insufficient conduct to amount to acceptance.

In Haines Haulage Co. Limited v Gamble⁸⁶ a dispute had arisen over the performance of a contract. After an exchange of correspondence the debtor wrote enclosing a cheque in full and final settlement together with a detailed account of how such amount was calculated. This letter was received by a Director of the creditor. After a delay of ten days the Director replied that the cheque was received on account only (there was no evidence before the court of the date of the banking of the cheque). The plaintiff then sued for the balance it claimed was owing. The defendant successfully pleaded an accord and satisfaction in the District Court. The District Court Judge in holding for the defendant had relied on Homeguard. The Plaintiff appealed.

Barker J. on appeal in the High Court stated that he thought it correct that the decision of Mahon J. on the point did not represent the current view of the Court.

Barker J. stated:⁸⁷

"The question really is, whether the delay of some ten days on the part of Mrs Haines in writing to the debtor, saying that the cheque was not received on that proffered basis, was in the circumstances a sufficient rejection of the offer to rebut the inference created by the banking of the cheque on some unknown date before the date of the rejection letter."

Barker J. stated that the authorities show that although accord and satisfaction is solely a question of fact, the mere banking of the cheque does "raise a weighty inference"⁸⁸

It is submitted that there are two major fallacies in the reasoning of Barker J. The first is that he states that there is an inference raised which must be rebutted by the creditor on the banking of the cheque, that such is an acceptance of the offer. As stated above, this runs counter to the rationale behind the rule in Felthouse v Bindley that there should be no onus placed on the offeree to signify his rejection of the offer. The second is, that there was no evidence as to the date of banking, merely evidence that there had been a ten-day delay in the

⁸⁶[1989] 3 NZLR 221.

⁸⁷Ibid at page 224.

⁸⁸Ibid.

creditor writing to say that the offer was rejected. Barker J. found in the circumstances that the rejection of the offer should have been notified earlier⁸⁹. This seems to be equating a ten-day silence with acceptance, and goes against the rule in Felthouse v Bindley that silence cannot signify acceptance. As McLauchlan states in his article,⁹⁰ Barker J. seemed to have viewed his task as to determine whether the conduct of the creditor was reasonable in all the circumstances, not what was the reasonable impact that conduct had on a particular debtor.

The principle that there is a weighty inference on banking that the offeree has accepted the offer was further supported in the case of D.F.C. New Zealand Limited & Anor v Wellington City Council, the facts of which have been canvassed earlier⁹¹. In that case, Master Williams cited Haines and said:⁹²

"... the Court is entitled to draw an inference in favour of the debtor from the banking of the cheque especially where there is no clear and prompt expression from the creditor of non-acceptance or dissent from the basis on which the cheque was sent."

This, it is yet again submitted, runs counter to the rationale behind the rule in Felthouse v Bindley that there should not be placed on the offeree an onus to reject the offer.

In Budget Rent-a-Car Limited v Goodman and Alston⁹³, payment and not banking was taken as the crucial time of acceptance. The facts of this case have been dealt with earlier⁹⁴. In that case there was a delay of just over a week before the creditor wrote back rejecting the basis on which the cheque was proffered. Master Williams held that although the cheque was receipted on 7 August it was not banked until 8 August.

As stated earlier⁹⁵ Master Williams in this case considered the date of payment and not the date of banking

⁸⁹Ibid at page 224 line 20.

⁹⁰Supra note 10.

⁹¹Supra page 18.

⁹²Supra note 37 at page 25.

⁹³Supra at note 36.

⁹⁴Supra at page 16.

⁹⁵Supra at page 16.

to be the crucial date. He stated that therefore it followed the payment was not received by Budget or its agents until 8 August or later by which stage it had or possibly was in the process of advising Mr Goodman through his solicitors that it did not accept the cheque in full settlement of his obligations and that it intended to sue him for the balance⁹⁶.

Therefore Master Williams seems to be holding that the creditor must at the same time or possibly very soon after the date of payment notify the debtor that his offer is not accepted. This still places an onus on the offeree to do a positive act, it merely delays the date at which this positive act must be done to the date of payment and not to the date of banking. As outlined above, this runs counter to the rationale in Felthouse v Bindley that the offeree should not have to do a positive act to signify his rejection of the offer.

Almare Car Sales Limited v McCulloch⁹⁷ is yet another decision of Master Williams. In that case Mr McCulloch signed an agreement to purchase a 1977 Mercedes Benz for \$19,990. The contract required that he pay a 'non-refundable deposit' of \$7,000 on signing and the balance was to be paid in cash. The contract further provided that "in the event that the agreement becomes unconditional and the purchaser does not complete the transaction, the deposit shall be forfeited to the dealer".

When Mr McCulloch got home he and his wife had a strong disagreement and she forbade him to buy the car. Because of this he subsequently stopped the cheque for the deposit. From that point on there was a dispute as to the facts.

Mr McCulloch went into the plaintiff's car yard. He gave the plaintiff a cheque for \$400. Mr McCulloch said that this was to compensate the plaintiff for the "hassle" that they had and the money which the plaintiff had expended on the vehicle.

Mr Almare stated that there was no question at all in the discussion he had with Mr McCulloch that he was going to buy the car, but that he had to talk his wife around. Mr Almare said the payment of the \$400 was made quite clearly as a goodwill gesture on account for the costs already incurred by the plaintiff.

⁹⁶Supra note 36 at page 11.

⁹⁷Unreported, High Court Wellington, Master Williams, 13 December 1990.

In any event the plaintiff banked Mr McCulloch's \$400 cheque. There was no evidence that there was any other contract at all between the parties until the plaintiff issued these proceedings about eight days later.

In mitigation the vehicle was sold, but no details were given of the sale. The court had no knowledge as to whether the vehicle was sold at a profit or at a loss.

The question for the court was whether the banking of the \$400 cheque amounted to an accord and satisfaction.

Master Williams went through the recent cases after Homeguard on the issue. He stated that it essentially came down to a question of fact to be judged objectively. He stated one of the matters of great moment in that evaluation is whether or not there has been any delay on the part of the creditor in rejecting the cheque or in objecting to the reason for its being proffered.

The Master further stated that:⁹⁸

"... there appears to have been no rejection of Mr McCulloch's position or any objection to the basis on which he says the cheque was given to Almare over the period which led up to the issue of these proceedings. That issue and service, of course is the clearest possible evidence that Almare did not accept Mr McCulloch's cancellation of the contract, but even so, as the authorities discussed above show, the delay of some eight days tells against Almare's version of events to some extent at least."

However he held that it was not necessary to reach a conclusion on this issue as the application for specific performance had been abandoned, and the only claim before the court was that on the dishonoured cheque. He then went on to deal with the law in relation to dishonoured cheques and eventually dismissed the application for summary judgment.

One criticism, it is submitted, which could be levied against the obiter statement of Master Williams, that an accord and satisfaction is likely to have arisen, is that even on Mr McCulloch's version of the facts it is not altogether clear that the cheque was expressly offered in full and final settlement of the claim. It is submitted, that this is yet further evidence of the fact that the courts in deciding cases on cheques proffered in full and final satisfaction, appear to be divorcing themselves somewhat from the strict rules of contract.

⁹⁸Ibid at page 9.

Once more, Master Williams asserted his view of the case law, from which he expresses no dissent, that there is an onus on the creditor to reject the condition upon which the cheque was proffered. It is submitted, as Master Williams himself expressly states, that in this instance, the issue of the proceedings some eight days later was the clearest possible evidence that Mr Almare did not accept the basis on which the cheque was proffered. Indeed, it is the writer's experience in practice that a delay of only eight days before the issue of proceedings, is quite extraordinary and could only have occurred if Mr McCulloch had given his solicitor explicit instructions to prepare and file the proceedings on an urgent basis. If the rationale in Felthouse v Bindley was applied, and it was held that there should be no onus on the creditor to signify his rejection of the offer, then it should have been held that banking of the cheque in those circumstances was equivocal and could not objectively be viewed as communication of acceptance.

In Webster Developments Limited (in Receivership and in Liquidation) v J.A.J. Bassili & Anor⁹⁹, the facts of which have been dealt with earlier¹⁰⁰, Hillyer J. appears it is submitted, to have got it partly right. As will be recalled from that case, the debtor had sent a cheque in full and final satisfaction. The Receivers of the plaintiff held on to this cheque for some two months without banking it. They then returned the cheque and stated that it was not accepted in full and final satisfaction. Hillyer J. held that the retaining of the cheque and the fact that it was not presented would indicate to an independent observer that the offer had not been accepted. He stated in his view there was no agreement between the parties.

Although, this case is more of an authority, for the fact that executed consideration was needed to effect such accord and satisfaction, Hillyer J. declined to hold, as some of the cases had previously that the mere retaining of a cheque, together with silence over a long period amounted to acceptance. In doing so, although not expressly stating that such was the case, he was applying the rule in Felthouse v Bindley that silence cannot amount to acceptance.

As can be seen from the vast majority of cases to date following the landmark decision in Homeguard the common law principle that acceptance must be communicated in order to be effective has been overlooked. Further, the courts seem to have overlooked the rule, and the rationale behind the rule in Felthouse v Bindley that silence cannot

⁹⁹Supra note 41.

¹⁰⁰Supra at pp 20-23.

amount to acceptance. The most striking case in this regard is that of Haines where there was no evidence as to the date of the banking of the cheque, but Barker J. held that a delay of ten days in the creditor rejecting the offer amounted to acceptance. This, it is submitted, is tantamount to a finding that the creditor's silence amounted to acceptance. Nearly all the cases to date have stated that there is an onus on the creditor to reject the offer. This, as submitted earlier, runs counter to the rationale in the rule in Felthouse v Bindley that there should be no onus on the offeree to signify his rejection of the offer. Further, as submitted earlier, in general the mere banking of the cheque cannot amount to conduct which signifies communication of acceptance, as the same is equivocal. In this regard, it is further submitted that even if a creditor were to specify, which is sometimes the case, that banking of the cheque will amount to acceptance of the offer, that he is not permitted to do so. This is due to the rationale behind Felthouse v Bindley, that also applies where the offeror specifies a commonplace act to signify acceptance, that silence or the doing of such an act is equivocal.

It is submitted, that if the correct common law principles are applied, the banking of such a cheque in general could not amount to acceptance by itself, neither could further periods of silence. This rule is capable of certainty, as a creditor would not be taken to have accepted such offer unless he expressly states he has or acts in such a clear and unequivocal fashion that on the balance of probabilities, no other reasonable interpretation could be placed on his actions. In such a case, the debtor is not left without a remedy but such should be in restitution or in conversion for the value of the cheque.

This would have the benefit of not imposing an agreement on a party where it is unclear whether the offer has been accepted and that such agreement has in reality come into being. This would also be achieved by applying settled contract principles.

5. Consideration

The previous chapter dealt with the concept of agreement. This chapter proposes to deal with the consideration necessary to effect such an accord and satisfaction.

In doing so it will deal with many different aspects of such consideration. Whether executed or executory consideration is required in such contracts has already been dealt with earlier in this paper.¹⁰¹ This chapter proposes to deal with firstly the question as to what amounts to a disputed debt. The rule in Foakes v Beer¹⁰² states that acceptance of a lesser sum in full and final satisfaction of a larger liquidated and undisputed amount affords no consideration. However, it is settled law that payment of a lesser sum in satisfaction for either a disputed or an unliquidated debt does afford good consideration. This chapter proposes to deal with the question as to what in law amounts to such disputed debt. Secondly this chapter then proposes to deal with further related consideration questions. For instance, is there good consideration if the debtor merely pays a liquidated or undisputed portion of the debt. Further, should it be sufficient if there is consideration 'in fact' although not in law. A recent English Court of Appeal case felt that such was so. Finally this paper proposes to examine the doctrines of promissory estoppel and waiver. No consideration is necessary for either of these two doctrines but specific other requirements must be met.

a) Disputed Debt

It is settled law that payment of a lesser sum in satisfaction for either a disputed or an unliquidated debt does afford good consideration. The rationale being that both sides are giving something up: the creditor is giving up payment of the balance of the money, and the debtor is giving up his claim. However, it is still questionable whether the debtor in order to give good consideration must have merely an honest belief in his claim, or an honest belief based on reasonable grounds.

From Elizabethan times until the early part of the nineteenth century forbearance to sue upon a groundless

¹⁰¹Supra at Chapter 3.

¹⁰²Supra note 5.

claim was considered no consideration¹⁰³. Maule J. stated in Wade v Simeon¹⁰⁴:

"Forbearance to prosecute a suit in which the plaintiff has no cause of action (and in which ... he must eventually fail), according to the authorities is no consideration. It is no benefit to the defendant; and no detriment to the plaintiff."

The policy issue which was involved was stated by Tindall C.J., also in the case of Wade v Simeon¹⁰⁵. He stated:

"... [it] is almost contra bono mores, and certainly contrary to all principles of natural justice, that a man should institute proceedings against another, when he is conscious that he has no good cause of action."

In the middle part of the nineteenth century, the emphasis shifted away from whether or not the claim that was relinquished had any validity to whether or not there was an honest belief in the validity of the claim on the part of the person giving it up¹⁰⁶. Bowen L.J. in Miles v New Zealand Alford Estate Company¹⁰⁷ outlined that:

"It seems to me that if an intending litigant bona fide forbears the right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action where if in the end he succeeds in his defence; and I think therefore that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person

¹⁰³Filcocks v Holt (1589) 1 Leo 240; 74 ER 219; Peck v Loveden (1602) Cro. Eliz. 804; 78 ER 1013; Barber v Fox (1670) 2 Wms Saund. 136; 85 ER 860; Jones v Ashburnham (1804) 4 East 455; 102 ER 905.

¹⁰⁴(1846) 2 CB 548 at 566; 135 ER 1061 at 1068.

¹⁰⁵Ibid at page 565; 1067.

¹⁰⁶See Cook v Wright (1861) 121 ER 822 at 825-826.

¹⁰⁷(1886) 32 Ch. D. 266 at 291.

who at the time has to judge and make the concession. Otherwise he would have to try the whole cause to know if a man had a right to compromise it, in this regard to questions of law it is obvious he could never safely compromise a question of law at all."

There can be found many cases which express the rule solely in terms of the good faith of the forbearer¹⁰⁸.

Many more cases seem to place some restriction on the good faith principle. For example the requirement that the claim itself is reasonable in itself and not "vexatious or frivolous". The reference to vexatious or frivolous comes from the judgment of Bowen L.J. in Miles v New Zealand Alford Estate Company¹⁰⁹, which has been cited earlier. Cotton L.J. in that same case expressed the statement slightly differently. He said¹¹⁰:

"If there is in fact a serious claim honestly made, the abandonment of the claim is a good consideration' for a contract."

Fry L.J. in Miles considered there was no difference between the view of the other two judges. He stated that¹¹¹:

"... when a real claim is made and is a bona fide compromise that is ample consideration."

It is difficult to ascertain whether there is much distinction in practice between the varying statements of principle. As a claim is unlikely to be held to be honestly held if there were no reasonable grounds for believing the same to be true. It is submitted, there is a great deal of truth in the observation of Mason J. in Wigan v Edwards¹¹² where he states:

"... [the] different expressions of principle do not reflect an important conceptual difference. There will be few cases involving an honest or

¹⁰⁸NG Butler v Fairclough (1917) 23 CLR 78 at 96, Jayawickreme v Amarasuriya [1918] AC 869 at 873-874 per Lord Atkinson, Binder v Alachouzos [1972] 2 QB 151 at 159, 160 per Phillimore and Roskill JJ.

¹⁰⁹Supra at note 107.

¹¹⁰Ibid at page 283.

¹¹¹Ibid at page 298.

¹¹²(1973) 37 ALJR 586 at 595.

bona fide belief in a claim which is vexatious or frivolous."

Perhaps the most that can be said is that in an exceptional case, the court might hold that this additional element had not been satisfied.

The leading case in New Zealand on such issue is the case of Couch v Branch Investment (1969) Limited¹¹³. In that case Mr Couch, for the purpose of purchasing a launch, arranged a loan from the plaintiff finance company for \$6,500. This was due in one payment. A hire purchase agreement was drawn up, where Mr Couch's company was described as the hirer, Mr Couch as the guarantor, and the plaintiff as the owner. These descriptions were not correct.

The launch sank in circumstances where insurance was not recoverable. The repayment due was not made.

A director of the plaintiff visited the home of Mr Couch to discuss the matter. An agreement was then executed by Mr and Mrs Couch "in consideration of the plaintiff forbearing to take court action against Mr Couch for \$6,500".

Mr and Mrs Couch agreed to pay that sum on demand with interest at ten percent per annum and to give the plaintiff a mortgage over two properties they held in joint names, and to put the properties on the market for sale.

The agreement was prepared by a firm of solicitors instructed by Mr Couch on behalf of himself and his wife. She was not separately legally advised.

Later Mr Couch was adjudicated bankrupt and Mr and Mrs Couch separated. One of the properties was sold at a mortgagee sale with no surplus. The other property was awarded to Mrs Couch under the matrimonial property settlement.

The plaintiff called upon Mrs Couch to give a mortgage over the second property and she refused. Proceedings were then commenced against her and Mr Couch. Mr Couch gave evidence for Mrs Couch in the proceeding but otherwise took no part.

In the High Court judgment was awarded for the plaintiff in damages but not specific performance.

¹¹³[1980] 2 NZLR 314 (Court of Appeal).

The High Court had held that although the original contract was unenforceable as it was in breach of the Hire Purchase and Credit Stabilisation Regulations 1957, the plaintiff honestly believed that the document described as a hire purchase agreement was valid and enforceable. Holland J. found no improper pressure had been placed on Mrs Couch by the plaintiff and that Mrs Couch had offered the security over the property if the plaintiff would allow her further time to pay and Mrs Couch had signed the agreement to assist her husband in obtaining time. He found she had signed it solely at his request and not at the request of the plaintiff.

The judge considered that a claim brought by the plaintiff against Mr Couch pursuant to the original agreement could not be regarded as vexatious, frivolous or unreasonable although it was bound not to succeed.

In the Court of Appeal, Cooke J. (as he then was) noted that Holland J. accepted as correctly stating the law the following passage from Cheshire and Fifoot Law of Contract¹¹⁴:

"A plaintiff who relies upon the surrender of a claim to support a contract must prove:

"(i) That the claim is reasonable in itself and is not 'vexatious or frivolous',

"(ii) that he himself has an honest belief in the chance of its success, and

"(iii) that he has concealed from the other party no fact which, to his knowledge, might affect its validity."

Cooke J. then examined the question as to whether an honest belief was enough. He examined the leading cases which stated it was, as long as the claim was not vexatious, frivolous or unreasonable. He further stated the cases which held that reasonable grounds also were needed.

Cooke J. stated¹¹⁵:

"... [the] ultimate question must be one of public policy. A person who extorts a

¹¹⁴9th edition, 1976 page 76, 5th edition 1979 at page 69.

¹¹⁵Ibid at page 319-320.

compromise of a claim which he knows to be spurious is not allowed to profit from his own wrongful conduct. The law could conceivably go further and hold that it is unjust to enforce settlement of hopeless claims brought by obviously misguided people and having only a nuisance value. Or it might be thought that a doubt as to a party's motives, even if a positive finding of bad faith cannot be made, justifies the court in looking at whether there is any substance at all in the claim not pursued. Whether such further steps should be taken or not is perhaps not clearly settled in any jurisdiction from which cases are available to us. The experience of the courts shows that it has not found it essential to lay down an absolute rule. There is much to be said for leaving room for an exceptional case in which, without quite attracting the stigma of lack of good faith, a claim is so unmeritorious or unconscionable that forbearance from pursuing it should not be treated as consideration."

Cooke J. accepted Holland J.'s conclusion that there was consideration for Mrs Couch's agreement, although, had the plaintiff tried to sue on the original contract it would have been doomed to fail.

However, His Honour held that as Mrs Couch had no independent legal advice, to treat the agreement as binding on her would be tantamount under the circumstances to allowing undue advantage to be taken of her.

Richardson J. conducted a thorough examination of all the cases on this issue, starting with Cook v Wright¹¹⁶.

Richardson J. stated¹¹⁷:

"In principle there is much to be said for the view that the unenforceability of compromises and forbearances where there is an absence of honest belief in a cause of action or absence of any real intention to pursue such a claim is based on public policy rather than want of consideration. It is obviously of benefit to the promisor to be relieved of a need to defend a suit, even one he considers ill-founded (as the promisor did in Cook v Wright). Indeed the greater the embarrassment and expense to him of having the claim publicly litigated, the greater the argument for enforceability of the

¹¹⁶(1861) 1 B & S 559; 121 ER 822.

¹¹⁷Supra note 113 at page 326.

compromise or forbearance if viewed simply in terms of the benefit/detriment test of consideration. And relinquishment of a claim is patently detrimental to the promisee if the possibility of success in litigation or the possibility that an even unfounded claim may be admitted may justify pursuing the claim. But to regard the benefit to the promisor of not being vexed by the promisee's claim as sufficient consideration warranting the enforcement of a promise, without any requirement of honesty of belief and conduct on the part of the promisee, would open the processes of law to abuse and encourage extortion. The foundation for the test of enforceability of compromises and forbearances, although formulated in various ways and cases, seems to me to lie in considerations of that kind."

McMullin J. felt that it might be difficult to formulate a general rule to cover the various circumstances of individual cases. However, he felt from an analysis of the cases to date, the law was that except in cases where the agreement in respect of which the forbearance to sue was a sham or so frivolous or vexatious that it was patently obvious even to a layman it could not succeed so as to make its assertion incompatible with honesty and a reasonable degree of intelligence, the courts would not inquire into the merits of a course of action upon which the forbearance to sue was based. He felt that it would be sufficient if the promisee honestly believed that he had a good cause of action¹¹⁸.

Therefore, it can be seen, all three judges in the Court of Appeal felt that in essence the giving up of any claim, afforded good consideration, the restriction that there must be an honest belief in the cause of action and that the same must not be vexatious, frivolous or unreasonable was merely a requirement of public policy more than want of consideration.

The reality of the situation, appears to be that the courts will find there is consideration where the promisee gives up his right to a cause of action which is doomed to fail, if he honestly holds the belief that such will succeed, or has a chance of succeeding, unless some exceptional case occurred where it might feel obliged not to do so. The court, in this case by adding the rider that such claim must not be vexatious frivolous or unreasonable, it is submitted, has merely left the door open, as is stated by Cooke J. for an exceptional case which without quite attracting the stigma of lack of good faith is so unmeritorious that the courts would wish to

¹¹⁸Ibid at page 345.

hold that forbearance from pursuing it should not be treated as consideration.

Surprisingly, the cases concerning cheques proffered in full and final satisfaction, do not seem to contain any detailed analysis as to whether the claim given up by the debtor, affords good consideration for the release provided by the creditor. The courts merely seem to have made blanket rulings that there is either a dispute or there is not.

The case of Couch v Branch Investments (1969) Limited¹¹⁹ was discussed in the further Court of Appeal decision of Moyes & Groves Limited v Radio New Zealand Limited¹²⁰. In that case a buyer had ordered goods from a seller in June 1973. The goods had to be manufactured in India. In the normal course of events the goods would have arrived some nine months after the order, but due to unexplained reasons the goods arrived in June 1976; by this time both the buyer and the seller had forgotten about the contract. The costs of the goods had originally been \$400 but had increased to \$2,737. The buyer wanted to obtain the goods at the original price, but the seller was only prepared to supply them at the cost it would have to pay to receive them which had now substantially increased. The seller stated that if this was unacceptable it would return the goods to India.

On 1 December 1976 after Customs had given the seller ten days to pay the duty and uplift the goods, the buyer replied by letter:

"... appears no alternative but to accept your price under protest."

Having obtained the goods the buyer only paid \$400 and the seller sued for the balance.

In the Magistrate's Court judgement was entered for the seller holding that the original contract had been treated by the parties as not existing, and in 1976 there had been a new contract or a variation to a new price in consideration for the seller refraining from returning the goods to India. The learned judge also rejected a defence of duress.

On appeal Casey J. held that the seller had no right to insist on a unilateral variation of the price. The seller was granted leave to appeal to the Court of Appeal.

¹¹⁹Supra at note 113.

¹²⁰[1982] 1 NZLR 368.

In the Court of Appeal it was held that there was a genuine disagreement on substantial grounds between the parties and the question as to the effect the delay had on the contract was a difficult one, as the law on the subject was not at all clear. In this case, Cooke J. held that the parties had not consciously treated the original contract as at an end but had both completely overlooked it. Cooke J. stated that¹²¹:

"... prima facie the seller might well have had a right to reject the goods for undue delay by the manufacturers."

As can be seen, this is not the situation which existed in Couch of a bona fide compromise of a hopeless claim, as it was held that the claim compromised had a great deal of merit. Indeed, Cooke J. stated further that¹²²:

"In these circumstances I do not think that anyone could have said with confidence in 1976 whether or not the 1973 contract between the seller and the buyer was still in force. This is borne out by the different conclusions reached by the Magistrate and the Judge."

Cooke J. went on to state that a compromise of disputed rights where there were genuine and substantial claims on both sides may undoubtedly constitute good consideration. He stated that the cases cited in the Supreme Court judgment did not entrench that principle. He further stated that the court had to consider the principle in Couch with particular reference as to whether forbearance to sue could constitute good consideration if the party forbearing bona fide believed in the claim which was in truth totally unfounded.

The discussions, His Honour stated, in that decision concerned tenuous claims where epithets such as 'frivolous', 'vexatious', 'hopeless' and 'unreal' were used. His Honour stated that the case and the authorities collected there indicated putting the point at its lowest, that the courts are very slow to reject a compromise of a bona fide claim for consideration on the mere ground that on subsequent analysis may seem that it had very small prospect of success. Indeed, Cooke J. himself admitted that the case was a very far cry from the kind of tenuous claims under discussion in Couch.

Cooke J. held that there was no doubt as to the bona fides of the seller. Without deciding expressly the merits of the claim, he found that the seller had substantial

¹²¹Ibid at page 379 lines 26-27.

¹²²Supra at note 120 page 371 lines 28-31.

grounds for taking the position he did which was evidenced by the decision at first instance whether right or wrong. Therefore, he held that in his view the seller when he gave up such proposed course of action, provided consideration for the buyer's promise to pay the higher price. Indeed, it is submitted, that it is noteworthy and implicit support for Couch that Cooke J. did not feel it necessary to decide the eventual merits of the claim.

The buyer in Moyes had further contended that any agreement given by it to pay the higher price was given as a result of economic duress. Cooke J. however found that this was not a case of coercion of the buyer's will, rather it was a prudent and sensible compromise of a difference on which there is much to be said on both sides.

Somers J. agreed with the decision of Cooke J. and held that he was satisfied that the correspondence amounted to a compromise of a disputed claim and as in the case of any other contract the existence of a compromise was a matter of objective fact.

Ongley J. agreed with the judgments of Cooke and Somers JJ. and had nothing further to add.

Although, there were reasonable grounds for the seller's original stance in Moyes, it is submitted, that such highlights the desirability of the decision in Couch that a bona fide compromise of a disputed claim should be sufficient and that it should not matter whether such was on reasonable grounds. It is submitted that it is significant that the court did not feel it necessary to decide who would have been eventually successful had the compromise not been reached. Due to the decision in Couch a court does not have to entertain arguments on the merits of such claim, merely the honest belief of the parties involved, as long as the same is held not to be vexatious or frivolous. This has the benefit of enforcing compromises parties have agreed to, and taking such out of the already overloaded court system.

Possibly the most recent case to consider the Court of Appeal decision in Couch v Branch Investments (1969) Limited¹²³ is the High Court decision of Master Hansen in Thermaseal Double Glazing Limited v Gilbert Lodge and Company Limited¹²⁴. In this case the plaintiff sought summary judgment relying on a cause of action in conversion. Essentially a machine had been sold by the

¹²³Supra at note 113.

¹²⁴Unreported, High Court Christchurch, Master Hansen, 22 April 1992.

defendant during 1991 to a company called Eastwick Holdings Limited subject to a reservation of title clause. The price payable was \$7,195.50 of which only \$1,500 was ever paid. In September 1991, the plaintiff purchased from Eastwick the double glazing side of its business and the machine in question was included in the sale. The sale did not involve the plant being removed physically as the plaintiff took over the premises previously occupied by Eastwick.

On 25 November 1991 in an attempt to follow up Eastwick's non payment of the balance owing a representative of the defendant visited the premises where the machine was operating. The representative learned that the machine had developed a leak and he stated he would take it to his workshop to repair it and return it the next day. The Plaintiff agreed to this course of action.

The defendant said that after taking the goods to its workshop it discovered Eastwick had been placed into receivership and it then sought legal advice, and was informed that it was entitled to retain possession of the machine under its reservation of title clause.

Acting in reliance on its legal advice the defendant informed the plaintiff on 26 November that because of the reservation of title clause the defendant owned the goods and that it required the outstanding balance on the June transaction to be paid before it would return the machine.

The plaintiff in turn consulted its legal advisers who faxed a letter to the defendant asserting that the defendant's reliance on the reservation of title clause was misplaced and that the plaintiff had title. Return of the machine was also demanded in this letter.

On the morning of 27 November at approximately 10.30 a.m. the plaintiff made the payment demanded, being the sum of \$5,695. It would appear that this was done without reference to its solicitors. Such payment was made without any reservation or condition attached to it. After the plaintiff's solicitor had learned of the payment it sent a fax to the defendant reiterating the statements made in the earlier fax and demanding return of the money paid over.

The defendant's response was that the payment had closed the matter. The plaintiff then commenced this proceeding in which it sought damages for lost production, exemplary damages and liquidated damages for the sum of \$5,695. In the summary judgment proceeding judgment was merely sought on the question of liability and for the liquidated damages of \$5,695, and directions for the trial on the quantum of the remaining damages.

The defendant at the hearing did not press any argument as to the effectiveness of the reservation of title clause, which appeared to have an implied power of sale in any event or any argument that conversion had not occurred. The defendant however argued that an accord and satisfaction had been effected. The plaintiff had offered to release the machine if the payment was made. Payment had been made and at that time the contract had been completed. The consideration it was submitted was the bona fide compromise of a disputed claim. In doing so the defendant relied on the case of Couch v Branch Investments (1969) Limited¹²⁵. The plaintiff in turn argued that as the defendant had received the full balance of the monies outstanding, it had given up nothing and therefore afforded no consideration. The plaintiff further argued that the decision in Couch was merely a case concerning forbearance to sue and not compromises generally.

Master Hansen rejected those submissions and held that the distinction between a permanent forbearance and a claim that was compromised was more apparent than real. He stated¹²⁶:

"Forbearance of the claim may be the consideration in a contract of compromise, but as suggested in the extract from Cheshire, I consider it logical that the withdrawal of a claim is consideration and an agreement of compromise should be treated in the same way as the forbearance of a claim."

It is submitted, that this is indeed correct, as although Couch was expressly concerned with a forbearance to sue, many of the decisions relied on by the learned judges were in fact compromise decisions. Secondly, at least McMullin J., phrased his decision in terms sufficiently wide to cover both scenarios. He stated¹²⁷:

"... I think it more consistent with authority to deal with the matter on the wider basis of public policy which requires that bargains entered into by individuals be enforced by the Courts unless they fall within the exceptions already discussed. That kind of approach would result in the courts lending their aid to the enforcement of compromises which parties have made for themselves at the same time as holding support in cases where enforcement would result in the maintenance of a fraud."

¹²⁵Supra at note 113.

¹²⁶Supra at note 124 page 7.

¹²⁷Supra at note 113, p.336 line 32.

Further, in relation to the latter point raised that if the plaintiff had received all the monies due it had in fact not given up anything, it is submitted, that this is the incorrect way to approach the problem. Consideration, on a more basic level, it is submitted, need not be the giving up of something by one party, but can be the bestowing of a benefit by that party on the other party, or as Richardson J. stated in Couch, the avoidance of a detriment.¹²⁸

In this case, although the defendant had received all the monies due to it, it had in return given back to the plaintiff, the machine it desperately needed for its work. Therefore, it had bestowed a benefit on the defendant. This was the direct result of the consideration it supplied in releasing its claim to the machine.

In H.B.F. Dalgety Limited v Morton¹²⁹, a case concerning a cheque proffered in full and final satisfaction of a claim, the facts of which have been dealt with earlier¹³⁰ Hillyer J. held that no dispute existed. As will be recalled in that case a real estate agent claimed to be due to him, the sum of \$9,760.98 for the commission on the sale of a property which had been effected through its agency. Some weeks later Mr Morton had returned the invoice together with a cheque for \$2,450. Written on the invoice was the following:

"My estimate of costs on a 'work done' basis
\$2,450."

The District Court Judge had held that there was a dispute as to the debt based on the words inscribed by Mr Morton on the invoice. Hillyer J. on appeal to the High Court rejected such claim. He stated¹³¹:

"If an amount is owing there is an obligation to pay that amount. If there is a genuine dispute as to the amount owing, or as to whether it is owing, then an agreement to accept a lesser amount, coupled with a payment of that lesser amount may be accord and satisfaction. If a debtor gives a cheque for a lesser amount, acceptance of that cheque and banking it could be evidence of such agreement.

¹²⁸Supra at note 117.

¹²⁹Supra at note 43.

¹³⁰Supra at page 33.

¹³¹Ibid at page 413.

If however the creditor's claim is for a liquidated sum which is not genuinely disputed by the debtor, then prima facie, under the rule in Foakes v Beer (1884) 9 App.Cas. 605, there is no consideration for any agreement by the creditor to accept the cheque in a full satisfaction. Unless one of the exceptions to Foakes v Beer applies, the creditor can recover the balance of the debt.

There must be a genuine dispute, it is not sufficient for the debtor to be reluctant to pay."

Hillyer J., cites as authority for the last paragraph in the quote, the case of D & C Builders Limited v Rees¹³². In that case the Plaintiff did work for the defendant for which he was owed the sum of £482. Later the defendant's wife on behalf of her husband offered to pay him the sum of £300 in settlement, knowing that the plaintiff was in financial difficulties and taking advantage of this fact. She stated that if he refused this offer he would get nothing. The plaintiff reluctantly agreed to accept the cheque for £300 and then sued for the balance. The Court of Appeal held he was entitled to do so.

It is certainly clear, that where a debtor raises no dispute of such a debt, but merely states that he has insufficient funds to pay that there will be no genuine dispute. However, it is submitted, that just because a judge finds that he feels the sum is genuinely owing under a contract, does not mean that the debtor does not have a bona fide belief that he has a genuine defence to such claim although the same may be doomed to fail.

Hillyer J. referred to the finding of the District Court Judge that there was a dispute as to the debt in this case, based on the note made by Mr Morton at the bottom of the Dalgety invoice. He stated:¹³³

"In my view, with respect, this is not a proper inference from what is written. The amount payable pursuant to the real estate scale of charges, is an amount which can be accurately and exactly quantified. It was not suggested in the court below or before me, that the amount claimed as being the amount of commission, was not accurately calculated in accordance with the scale. Equally, in the terms of Cl. 11 which I have recited, there is no room for any doubt but

¹³²[1966] 2 QB 617.

¹³³Supra note 43 at page 414.

that Dalgety whose name did appear on the front page of the agreement, was entitled to commission. The fact that the respondents did not wish to pay the amount did not mean that there was a genuine dispute. Debtors frequently are unwilling to pay amounts, there must be some proper basis for such an attitude before there will be a genuine dispute.

It is submitted that this statement by Hillyer J. is not wholly in keeping with the leading Court of Appeal authority in New Zealand of Couch v Branch Investments (1969) Limited.¹³⁴ It is submitted that just because there are no reasonable grounds for such dispute, does not mean there is not a genuine dispute.

Nevertheless, Hillyer J. went on to hold, it is submitted, on much stronger ground, that the statement "my estimate of costs on a 'work done' basis" did not make it clear that the amount paid was paid only on the basis that it was in full and final satisfaction.

It is submitted, that Hillyer J. would have been on much stronger ground had he held that the absence of any reasonable grounds for such dispute, led him to believe that the belief as to the validity of his claim was not genuinely held by Mr Morton.

In Equitable Securities v Neil¹³⁵ a debtor owed a creditor monies which were secured under first and second mortgages. A mortgagee's sale was effected by the creditor under its first mortgage but it realised insufficient funds to repay the creditor in full.

Bankruptcy proceedings were instituted against the debtor, and the claim subsequently settled.

The debtor's solicitor sent in a cheque for the settlement sum and stated that it was in full and final settlement from the balance outstanding from the debtor to the creditor. The cheque was banked by the creditor's solicitor.

A short time later the creditor wrote to the debtor's solicitor acknowledging the cheque but seeking a substantial amount due under the second mortgage. The debtor's solicitor had been unaware of the second mortgage but he responded saying the cheque had been in full and final settlement of all claims.

¹³⁴Supra at note 113.

¹³⁵[1987] 1 NZLR 233.

In the District Court, Callander J. entered judgment for the debtor. The debtor had argued two defences existed. Firstly he had argued an accord and satisfaction had arisen when the cheque was banked, following the decision in Homeguard. The District Court judge rejected this claim as he held there was no consideration for any such agreement as the debt in question was undisputed and liquidated. However, the defendant succeeded on an argument that section 21(b) of the Bills of Exchange Act 1908 applied. This will be dealt with later.

The Plaintiff then appealed to the High Court. Chilwell J. upheld the appeal, but on somewhat unhelpful grounds. His Honour held that the condition accompanying the cheque was unclear and a fair interpretation would be that it was in full settlement of the bankruptcy proceedings.

In this case, it is submitted, that a finding that the debt was undisputed was wholly justified. The debtor had never raised any dispute as to the amount owing, the claim was merely settled as the debtor had insufficient funds to pay the whole of the monies outstanding, and the facts of the case were completely within the realms of Foakes v Beer.

It is submitted, that on the facts in the subsequent case of Almare Car Sales Limited v McCulloch¹³⁶ which has been dealt with earlier¹³⁷, it is doubtful whether a genuine dispute did exist.

As will be recalled, in that case on the defendant's own statement of the events, he had given Mr Almare a cheque for \$400 as a goodwill gesture on account of the costs already incurred by him. The contract provided that:

"In the event that the agreement becomes unconditional and the purchaser does not complete the transaction the deposit shall be forfeited to the dealer."

Here, the deposit had been paid but the cheque stopped. Even on Mr McCulloch's own version of the events, he had subsequently handed over a \$400 cheque to Mr Almare as a goodwill gesture on account of the costs incurred by him. This does not necessarily mean that he genuinely disputed that the sum was owing under the contract, and the question as to whether there was a genuine belief by him that there was a dispute was not addressed.

¹³⁶Supra at note 97.

¹³⁷Supra at pages 41 and 42.

In the case of N.Z.I. Finance Limited v Barber¹³⁸ it was stated that Mr and Mrs Barber and the companies controlled by them had "suffered severely from the then current farming and economic climate" and as a consequence due to their financial situation were forced to discuss their financial affairs with their creditors. They then undertook refinancing and ultimately had to sell the land which they owned.

N.Z.I. Finance was one of such creditors with which they had discussions. It had lent the defendant the sum of \$50,000 pursuant to a term loan agreement. As part of the defendants' refinancing they borrowed \$300,000 from N.Z.I. Finance on a three-month term. This was secured by a mortgage over two titles owned by the defendants' companies. The land was subsequently sold at a mortgagee sale and summary judgment proceedings were issued for the balance unsatisfied after such sale.

By way of defence the defendants claimed monies paid to N.Z.I. on the sale of their properties were agreed to be accepted by it in full and final satisfaction.

Previously, when such land was sold at mortgagee sales N.Z.I. Finance had offered the defendants alternatives regarding repayment in a letter sent to them. The same letter had reserved its right to sue for the balance if the offer was accepted and a sale did not occur.

There was further correspondence between the parties: then on 8 August 1988 the plaintiff offered a discounted settlement figure which was open for one week if further information was supplied to it. In the reply to this letter by the defendants an extension of time was sought. There was then further correspondence and subsequently a sum was sent to the plaintiff which was less than the full amount. The plaintiff sued for the balance owing to it and the defendants argued accord and satisfaction had occurred.

It was held firstly that there could be no suggestion as to any agreement to accept less than the full amount by N.Z.I. Finance which it claimed it was owed in a manner which precluded it, under section 92 of the Judicature Act 1908, from proceeding.

Master Williams then went on to cite a passage from Hillyer J.'s judgment in H.B.F. Dalgety v Morton¹³⁹ where he stated, *inter alia*, that there must be a genuine

¹³⁸Unreported, High Court Palmerston North, 8 February 1991, Master Williams.

¹³⁹Supra at note 43.

dispute not merely a reluctance on the debtor's part to pay. Master Williams held that there was not at any time a dispute as to the debt owed or as to the amount of it. This finding, it is submitted, is justified on the facts of the case. The debtors never appeared to have at any time disputed the debt, merely pleaded the fact that they were in financial difficulties. However, the question of the bona fides of their belief and the Court of Appeal decision in Couch were never examined.

The case of Webster Developments Limited (in Receivership and in Liquidation) v J.A.J. Bassili and Another¹⁴⁰, the facts of which have been dealt with earlier¹⁴¹, is yet another case where there merely appears to have been a blanket ruling that there was either a dispute or was not without the bona fides on the defendant's belief ever being discussed.

In this case, counsel for the plaintiff had submitted that there was no dispute as to the amount due and that therefore the principle in Foakes v Beer applied as there was no consideration for any agreement by the creditor to accept a cheque in full satisfaction. Hillyer J. stated he had dealt with this principle in H.B.F. Dalgety v Morton, which has been discussed earlier.

In Webster, it will be recalled, the plaintiff had been suggesting that a number of credits should be given against the rent said to be due. Hillyer J. had stated that there was also the possibility that the property would be let for the balance of the term at a lower rental but one sufficient still to provide with the other amounts that had been paid a profit for the period over and above the amount the lessor could have expected to receive from the lessee had the lease continued.

In those circumstances, Hillyer J. felt that he was unable to accept there was no dispute as to the amount owing.

As can be seen, the cases concerning cheques proffered in full and final satisfaction, after Homeguard, do not seem to have dealt in any detail with the question as to whether or not a genuine dispute exists as to the amount owing. Indeed, none of the cases since and including Homeguard seem to have even cited the leading authority of Couch v Branch Investments (1969) Limited¹⁴².

¹⁴⁰Supra at note 41.

¹⁴¹Supra at pp 20 to 23.

¹⁴²Supra at note 113.

It is submitted, that the reasoning in Couch v Branch Investments (1969) Limited is correct, and that if one were to hold that the debtor's belief as to his claim had to be based on reasonable grounds, then in the majority of cases such claim would actually have to be tried to ascertain whether it would have succeeded. This, would hinder the compromise of suits. The outlet of providing that the same must not be vexatious or frivolous leaves the door open as Cooke J. stated in Couch to an exceptional case, in which, while not quite attracting the stigma of lack of good faith is so unmeritorious or unconscionable that forbearance from pursuing it should not be treated as consideration.

Therefore, it is submitted, that it is insufficient for a court to hold, as was done in H.B.F. Dalgety v Morton¹⁴³ that it found that the sum was genuinely owing under the contract. As was submitted when this case was considered earlier, a better way to state the same, would be to hold that the lack of reasonable grounds for such a dispute led the judge to believe that the dispute was not genuinely held.

b) Is there Good Consideration if the Debtor merely pays a Liquidated or Undisputed Portion of the Debt?

Professor Brian Coote, in his article Cheques "in full satisfaction" of a larger Sum¹⁴⁴ examined the High Court decision of Mahon J. in Homeguard and the Court of Appeal decision in James Wallace Pty. Limited v William Cable Limited¹⁴⁵.

Professor Coote submits of Homeguard which has been dealt with in some detail earlier that the debtor afforded no consideration, as all he did was pay a sum which on his own calculations he admitted to be owing.

The Court of Appeal case of James Wallace Pty. Limited v William Cable Limited was a case decided one month after Homeguard and, appears to have been delivered in ignorance of Mahon J.'s decision in Homeguard. In that case, William Cable had contracted to manufacture and supply steel framing to Wallace Pty. who were the contractors for the construction of the Postal Centre in Wellington. Later William Cable claimed that part of the work it was required to perform under the contract was extras. James Wallace did not accept this claim. By September 1970 William Cable had completed performance of its sub-

¹⁴³Supra at note 27.

¹⁴⁴[1981] NZLJ 20.

¹⁴⁵(1980) 2 NZLR 187.

contract, so wrote to James Wallace making "formal application for the payment of all outstanding monies", which it stated to be \$57,623. About a week later James Wallace sent a cheque for the amount claimed less a small deduction, which William Cable did not question, and stated it was "final payment". William Cable duly banked the cheque without comment, and twelve months later resurrected its claim for extras and sought to recover the sum of \$47,530.

In the High Court, Jeffries J. made a finding that the acceptance of James Wallace's cheque did not constitute an accord and satisfaction barring William Cable's claim for extras, and made an order that James Wallace join in appointing an arbitrator to resolve the alleged dispute.

However, in the Court of Appeal it was held by a majority (Woodhouse and Richardson JJ) that as a result of the September 1970 correspondence James Wallace were discharged from any further obligations to William Cable under the contract. It was held that the correspondence constituted an agreement between the parties as to the final amount owing under the contract which included extras.

McMullin J. dissenting held that the correspondence did not indicate an intention on the part of William Cable to give up their claim for extras. He held that all Wallaces had done was to pay William Cable an amount which both sides acknowledged to be due according to the original schedule of prices made from the extras claim.

Therefore, as can be seen the judgment in itself is not particularly helpful as it merely turned on the interpretation of the correspondence.

As Professor Coote points out only Richardson J. dealt with the question as to whether consideration had been afforded by James Wallace. His Honour merely held that the rule in Foakes v Beer¹⁴⁶ did not apply as at September 1970 William Cable's claim was not for a liquidated or ascertained amount.

Professor Coote makes the point that this finding is not a complete answer to the consideration problem. He states that from all of the three judgments, the inference can be drawn that the quantification of the sum owing under the sub-contract, apart from the claim for extras, was a matter of accounting only and that it was because the figure claimed by William Cable in their letter of September 1970 did not include anything for extras that Wallaces paid it as it did. Professor Coote states that if those inferences are correct it is not easy to see how

¹⁴⁶Supra note 5.

the payment by Wallaces of the sum due under the contract about which there was no dispute could constitute consideration for that abandonment. Professor Coote states¹⁴⁷:

"By itself, the mere performance of a contract by one party cannot be his consideration for a second and subsequent contract between the same parties."

It is submitted, that this is indeed a very interesting point, as even though one could view the whole amount of any debt as one sum and therefore hold that if there is any dispute as to any part of that sum then there is a dispute, this often would not be a thorough enough analysis of the problem. In many cases when there is an amount in dispute, there will be a certain sum which the debtor concedes to be due.

This could happen in any court proceedings claiming a sum of damages. For instance, in the statement of claim, the creditor/plaintiff could plead certain sums to be due and owing. A debtor in his statement of defence could admit some of the claims and deny others. Could it therefore legitimately be said that a debtor in merely paying sums which he conceded to be owing in his statement of defence in full satisfaction had afforded consideration for the creditor relinquishing him from the obligation to pay the remaining outstanding sum? It is submitted, that it could not in reality, and indeed in law be said that he had given up anything for the creditor's forbearing to sue for the balance. The same reasoning should apply where there is one debt, and the debtor has conceded that a certain amount is due and owing, and likewise where part of a claim is partly liquidated and partly unliquidated.

The authors of Chitty¹⁴⁸, themselves, makes this point. They states that a creditor may have two claims against the same debtor, one of them liquidated and the other unliquidated, or a single claim which is partly liquidated and partly unliquidated. The authors of Chitty state that if the debtor pays no more than the liquidated amount and if his liability to pay this amount was undisputed, the payment will not constitute consideration for a promise by the creditor to accept the payment in full settlement of the whole claim in question.

¹⁴⁷Supra note 144 at page 21.

¹⁴⁸Supra at note 54 at page 229, para 231.

The authors of Chitty cite in support of this proposition the case of Arrale v Costain Civil Engineering Limited¹⁴⁹, a case in which an employee had been injured at his place of work. The legislation in force gave him a right against his employers to a fixed sum of £490 for which the employers did not dispute liability. It was further assumed in that case that the worker also had a right to common law damages. In that case the court held that any promise which the worker may have made not to pursue the common law claim was not binding by payment of the £490 as the employers had provided no consideration for such promise, they had merely done that which they were already bound to do.

Maclauchlan¹⁵⁰ deals with Professor Coote's argument as it affects the decision in Homeguard. He states that he feels that Professor Coote's argument is an interesting one and should have been addressed in the case but does not feel his point is incontrovertible. Maclauchlan does not seem to feel that it is the common law that there is no consideration for a compromise where all the debtor does is pay the lowest amount which he admits to be due. Maclauchlan goes on to state that it should not really matter that the debtor does not see fit to revise upwards his "opening bid".

It is submitted, however, with respect, that the two matters are completely different. If the debtor pays an amount he concedes to be due, then clearly there has been nothing given up by the debtor as he is paying no more than that he concedes he is bound to pay. If however, genuine confusion reigns as to what is indeed owed, and the debtor without concession or admission as to any portion of the debt offers a certain sum in settlement, then the creditor is not able to point to one specific portion of the debt being unliquidated or undisputed, and consideration would be afforded. The distinction may seem a fine one, but it is submitted that it is an important one.

The doctrine of consideration is an important cornerstone of our common law of contract, and requires that in order to create a contract both sides must give up something of value to themselves or bestow a benefit on the other party. Therefore, it is submitted that it is important for any court to be able to analyse such contract to see if the consideration has in fact been provided. This does not mean, of course that a debtor may be left high and dry, it simply means that if the court was to find that he has not in fact given up anything for the creditor's forbearance he must rely on other more uncertain remedies,

¹⁴⁹[1976] 1 Lloyd's Rep. 98.

¹⁵⁰Supra at note 10.

such as the doctrine of promissory estoppel or waiver which will be dealt with later. Further, if the acceptance of such sum in full and final satisfaction is put in writing by the creditor, then by section of 92 of the Judicature Act 1908 the creditor may not sue him for the balance.

It is submitted, further, that one case following Homeguard which cried out for the reasoning of Professor Coote to be applied to it completely overlooked such reasoning. Such is the case of Dunrae Manufacturing Limited v C.L. North & Company Limited¹⁵¹ the facts of which have been dealt with earlier¹⁵². In that case, as will be recalled there was a dispute over the amount due to Mr North for engineering and electrical work. Dunrae made two payments totalling \$11,458.48 and attached to the second cheque a handwritten note reciting that the cheque was tendered in full and final payment of its account with C.L. North & Company Limited. In the District Court the judge had found that two invoices had been sent out, and the cheque sent in full satisfaction was the exact amount of one of the invoices which was not in dispute. Smellie J. in the High Court dismissed this finding as irrelevant. Smellie J. stated that there was one contract and therefore one amount in dispute. Therefore, he held that prior to the payment being made by the debtor whole amount was in dispute.

However, it is submitted that the reasoning of the District Court judge in this regard was correct. Two invoices had been sent out, and the amount of the first one was not disputed. A cheque was sent in full and final satisfaction for the exact amount of this invoice. Therefore, it is submitted it cannot possibly be said that debtor was giving anything up as he was merely paying an amount he conceded to be due.

c) Should Consideration 'in fact' be Sufficient?

The writer submitted above that the strict rules as to consideration should be applied when dealing with the issue as to whether accord and satisfaction has arisen when a cheque is banked "in full and final satisfaction" of a disputed debt, and has further submitted that in some cases this would lead to a finding that no accord and satisfaction had arisen. However, it just this type of reasoning that has led the Court of Appeal in England in a recent decision to attempt to bypass the existing law of consideration, that holds that performance of an existing duty is no consideration for a fresh contract.

¹⁵¹Supra at note 34.

¹⁵²Supra pages 15 and 16.

In that case the Court of Appeal held that it was sufficient as the party had given a benefit in fact although not in law. The case in question was that of Williams v Roffey Brothers¹⁵³.

In that case the defendant was a building contractor who had entered into a contract to refurbish a block of flats and had subcontracted the carpentry work to the plaintiff for a price of £20,000. It was held to be an implied term of this subcontract that the plaintiff would pay interim payments related to the work it had completed. After the plaintiff had completed the carpentry work on the roof in nine of the flats and carried out other preliminary work for which it had received substantial interim payments, the plaintiff found that he was in serious financial difficulties as the price for which he had contracted was too low, and further that he had failed to supervise his workmen properly. The defendant was aware of the plaintiff's difficulties. It had a penalty clause under its main contract under which it would be liable if it had not completed the main contract on time. It therefore called a meeting with the plaintiff and agreed to pay him an extra £10,300 at a rate of £575 per flat on completion to ensure that the plaintiff was able to complete the work on time.

The plaintiff continued with the work and completed eight further flats and the defendant made one further payment of £1,500. The plaintiff then stopped work on the remaining flat and brought an action claiming £10,847. The defendant denied it was liable and in particular denied that the defendant could claim the additional money as the agreement to pay it was unenforceable for lack of consideration.

The judge at first instance held that the plaintiff was entitled to eight payments of £575 less a small deduction for defective and incomplete items, together with a reasonable proportion of the amount outstanding under the original contract, making a total after the deduction of £1,500 which had already been paid of £3,500. The defendant appealed to the Court of Appeal.

In the Court of Appeal all three judges, Glidewell L.J., Russell and Purchase JJ. dismissed the appeal holding good consideration had been supplied, although all expressed their views somewhat differently. The defendant also submitted on the appeal that the additional payment was only payable if each flat was completed, and on the judge's finding eight further flats had been 'substantially' completed. He argued that as substantial completion was something less than completion, none of the eight flats had therefore been completed and no further

¹⁵³[1990] 2 WLR 1153.

payment was due from the defendant. However, this argument was quickly done away with by Glidewell L.J. on the authority of Ward v Byham¹⁵⁴.

Glidewell L.J., on the consideration argument, quoted extensively from the judgment of Lord Scarman in the Privy Council decision of Pao On v Lau Yiu¹⁵⁵. That was a case principally concerning the doctrine of economic duress. However, the case also touched upon the question of whether or not the promise to perform an existing duty to a third party could be valid consideration. Lord Scarman stated that an agreement to do an act which the promisor is under an existing obligation to a third party to do, may well amount to valid consideration as the promisee obtains the benefit of a direct obligation.

Glidewell L.J. stated¹⁵⁶ that although Pao On v Lau Yiu was a case concerning a tripartite relationship, that is a promise by one person to perform an existing contractual obligation owed by it to a third person in return for a promise from that third person, Lord Scarman's words he felt seemed to be of general application and equally applicable to a promise made by one of the original two parties to a contract.

However, in that case Lord Scarman seemed to recognise that it may be much harder to find a legitimate consideration for a promise to perform an existing duty between the same contracting parties. Further, it is submitted that there is a clear and distinct difference between one party promising to perform an existing duty he already owes to that party, and the same party promising to perform that obligation to the third party. The law of contract is recognised as being the law of obligation, and has been described as a facility which allows parties to assume legal contractual obligation in a way in which the law recognises¹⁵⁷. Therefore in the case where a party is promising to perform an existing duty to a third party, he is assuming an obligation to perform that duty to the third party in addition to his assumption of obligation to perform that obligation to the original contracting party. Therefore, the third party as well as the party to which he has originally promised he will perform this action will both have an action against him for breach of contract should he fail to perform such duty. However, in the case of a promise to perform an existing contractual duty to the same party,

¹⁵⁴[1956] 1 WLR 496, [1956] 2 All ER 318.

¹⁵⁵[1979] 3 All ER 65, [1980] AC 614.

¹⁵⁶Supra note 153 at 521.

¹⁵⁷B. Coote, The Essence of Contract NZULR

that party gains nothing in law if the promise is broken as he already had a remedy against this party for breach of contract should the same eventuate.

Glidewell L.J. also placed reliance on the majority view in the decision of Ward v Byham¹⁵⁸ and the whole court in Williams v Williams¹⁵⁹; neither of these cases concerned the promise by one party to perform an existing contractual duty to that same party.

Glidewell L.J. stated that the present state of the law in this subject could be expressed in the following proposition¹⁶⁰:

"(i) If A has entered into a contract with B to work for, or supply services to B in return for payment by B and (ii) at some stage before A has completed his obligations under the contract B has reason to doubt whether A will be able to complete his side of the bargain and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time and (iv) as a result of giving his promise to B obtains in practice a benefit, or obviates a disbenefit, and (v) these promises are not given as a result of economic duress or fraud on the part of A, then (vi) the benefit to B is capable of being consideration for B's promise so that the promise will be legally binding."

Glidewell L.J. stated that counsel for the defendant had accepted that by promising to pay the extra sum the defendants had secured benefits. He further stated that there was no finding and no suggestion in the case that the promise was given as a result of fraud or duress. He stated that in his view the proposition outlined above did not contravene the principle in Stilk v Myrick¹⁶¹. He stated all the proposition did was refine and limit the application of that principle while leaving the same unscathed, which would apply for example where B secures no benefit by A's promise.

However, it is submitted that if this proposition was left to stand the case of Stilk v Myrick would have been decided differently. As will be recalled that case was one where two seamen had deserted, and the Captain of the

¹⁵⁸Supra at note 154.

¹⁵⁹[1957] 1 WLR 148, [1957] 1 All ER 305.

¹⁶⁰Supra at note 153 at page 521.

¹⁶¹(1809) 2 Camp 317.

ship had agreed with the rest of the crew that if they worked the ship back to London without the two seamen being replaced he would divide between them the pay which would have been due to the two deserters. However, on arrival at London the Captain refused to pay this extra pay and the plaintiffs' action to recover the extra pay was dismissed on the ground that no consideration had been supplied for this promise, as the seamen were doing no more than they were already contractually obliged to do. Therefore, as will be seen in that case, there were indeed extra factual benefits provided to the Captain of the ship, such as the balance of the seamen not deserting or staging a mutiny.

Russell L.J. stated that there was no hint in the pleading of the defendants that they were subject to any duress. He posed the question that could it be said that the defendants could now escape liability on the grounds that the plaintiff undertook to do no more than he had originally contracted to do although, quite clearly, the defendants on 9 April 1986 were prepared to make the payment and only declined to do so at a later stage? His Honour stated that it would certainly be unconscionable if this were their legal entitlement. His Honour further stated that he would have welcomed any argument if it could properly have been raised on the basis that there was an estoppel.

It is the writer's view that this is indeed the path which the court should have taken. The doctrine of consideration, and more particularly the principle that performance of an existing duty to that same party affords no consideration, has been a cornerstone of our common law for over two hundred years. Further, it seems unnecessarily tortuous, to firstly state that such promise is enforceable, but may be not enforced if it was obtained by virtue of the doctrine of economic duress. If one party has made a bad bargain, then it is submitted that it should be on that party to bear the risk of the bad bargain.

A strict application of such principle, it is conceded, could be unnecessarily harsh, but it is further submitted that the best way to afford relief in such situation is not to do away with such long-standing principle, but to afford relief on the slightly less certain doctrine of promissory estoppel. In that situation, if it truly was unconscionable for such promise to be resiled from then such should be enforced by virtue of the doctrine of promissory estoppel. Such doctrine being extended to be available as a cause of action in its own right. However, as such doctrine is really one of relief rather than right, then it will be the party who has made the bad bargain who will be left with the uncertainty as to whether the further promise will be enforced.

If Williams v Roffey Bros. is correct, then this would greatly restrict the operation of Foakes v Beer and in particular would have wide-reaching effects on law in relation to cheques in full and final satisfaction. On the authority of Williams v Roffey Bros. it would be open to a debtor to argue that although he merely tendered a cheque for a lesser sum in full and final satisfaction of a larger undisputed and liquidated sum, that he had afforded consideration for the creditor accepting such cheque in full and final satisfaction. The debtor could submit that this consideration was supplied as he was in dire financial straits, and the creditor obtained the benefit in fact of receiving some money as opposed to none. Further, he could argue that the creditor obtained the benefit of getting payment now as opposed to having to sue him for the balance and incur legal fees in the case and enforcement of the judgment.

As mentioned above, it is the writer's view, that the long-standing doctrine of consideration and more particularly the principle that performance of an existing duty to that same party affords no consideration should remain. If the same causes any injustice then this should be relieved inter alia by virtue of the doctrine of promissory estoppel, which leads us neatly into the next area for examination.

d) Promissory Estoppel and Waiver

The law of promissory estoppel has come a long way from its "revival" by Lord Denning in the case of Central London Property Trust v High Trees¹⁶². In that case a landlord had promised to accept half the rent due during the wartime as he was having difficulty in finding tenants. Subsequently the landlord issued proceedings for recovery of the difference between the lower rent he had agreed to accept and that due under the lease. There was clearly no consideration to support the promise by the landlord and such was not a mutual variation. It was noted that the common law doctrine of estoppel by conduct was only available on promises of existing fact not for promises of future action or intention. Denning J. (as he then was) "adopted" old equitable authority to enforce the promise not to require full payment of the rent.

Further cases modified this doctrine and held that the same could only be used as a defence to a cause of action and not as a cause of action in itself.¹⁶³

However, in recent times the doctrine of promissory estoppel has been released somewhat from its case law shackles, and recently the High Court of Australia has held in Waltons Stores (Inter State) Limited v Maher¹⁶⁴ that the doctrine may be used as a cause of action and not merely as a defence. The doctrine of promissory estoppel in that case was formulated in the following way:

- "i) that if a plaintiff has assumed or expected that a particular set of circumstances exists between it and the defendant or that it would exist and in the latter case that the defendant would not be free to withdraw from the expected legal relationship,
- ii) and if the defendant has induced the plaintiff to adopt that assumption or expectation, and
- iii) the plaintiff acts or abstained from acting in reliance on the assumption or expectation, and
- iv) The defendant knew or intended him to do so, and
- v) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled, and

¹⁶²[1947] 1 KB 130.

¹⁶³Combe v Combe [1951] 2 KB 215.

¹⁶⁴[1988] 62 ALJR 110.

- v) the defendant has failed to avoid the detriment either by fulfilling the assumption or expectation or otherwise then the promise or assumption will be enforced."¹⁶⁵

The law in New Zealand has moved very close to the position adopted by the High Court of Australia in Waltons Stores¹⁶⁶. As was agreed by the writer in the last chapter, the strict enforcement of the doctrine of consideration can lead to injustices in certain situations, however, it is submitted that if one wants to alleviate this injustice it is important that such be done in a reasoned and principled way. It is submitted, that the decision in Williams v Roffey Bros¹⁶⁷ which held in essence that consideration in fact although not in law is sufficient is not a correct way to proceed. As has been submitted by the writer in an earlier paper¹⁶⁸ a far better way to cure the injustice in the law is by virtue of the doctrine of promissory estoppel. The law of contract should be left intact, as it provides a useful mechanism for parties to assume legal contractual obligations to each other, and the law of promissory estoppel should be developed so as to impose a remedy in certain situations where the non-enforcement of such promise would lead to injustice.

In cases concerning cheques proffered in full and final satisfaction, promissory estoppel has often been pleaded in the alternative to accord and satisfaction, however the defence of promissory estoppel does not appear yet to have succeeded in one case not even in the decision of Homeguard itself.

In Homeguard, the facts of which have been dealt with in some detail earlier¹⁶⁹ Mahon J. dealt with the decision of Lord Denning M.R. in the case of D & C Builders Limited

¹⁶⁵This is the six-stage test expounded by Brennan J. in Waltons Stores (Inter State) Limited v Maher, *ibid* at page 127.

¹⁶⁶See Gillies v Keogh [1989] 2 NZLR 327, Burberry Mortgage Finance and Savings Limited v Hindbank Holdings Limited [1989] 1 NZLR 356, Westland Savings Bank v Hancock [1987], 2 NZLR 21 Harris v Harris Unreported, High Court Christchurch, Fraser J. 15/12/89.

¹⁶⁷Supra at note 153.

¹⁶⁸Promises Enforceable Without Consideration Research Paper, 1990-91, Master of Law, Law of Torts.

¹⁶⁹Supra at pages 5-12.

v Rees¹⁷⁰ where Lord Denning M.R. had stated of promissory estoppel:¹⁷¹

"This principle has been applied to cases where a creditor agrees to accept a lesser sum in discharge of a greater. So much so that we can now say that, when a creditor and a debtor enter upon a course of negotiation, which leads the debtor to suppose that, on payment of the lesser sum, the creditor will not enforce payment of the balance, then on the faith thereof the debtor pays the lesser sum and the creditor accepts it as satisfaction: then creditor will not be allowed to enforce payment of the balance when it would be inequitable to do so."

In D & C Builders Limited Lord Denning, however, held that promissory estoppel did not assist the defendant as there had been no "true accord", as the purported agreement had been obtained by undue pressure and there was therefore no real agreement by the creditor to forego the balance of the debt.

Mahon J. stated that his first objection to the invocation of promissory estoppel in such circumstances was that the common law rule requires consideration for the release if not under seal of an admitted or liquidated debt and it was a principle which had been considered and specifically reaffirmed by the House of Lords. He stated that the same should not be abrogated by an equitable doctrine not yet sanctioned in that form by the House of Lords.

However, as has been submitted by the writer above, the doctrine of promissory estoppel can happily coexist beside the law of contract, and more particularly the doctrine of consideration.

Mahon J. went on to say that the second objection he had to this doctrine was that the High Trees decision itself related to an agreement made before the monetary liability had become due, whereas in the Foakes v Beer the agreement express or inferred, necessarily applied an existing liability. He stated further that Sir Alexander Turner speaking editorially in Spencer Bower and Turner on Estoppel by Representation¹⁷² had expressed the view that the High Trees decision for the reasons stated could not be applied so as to negate the result which would accrue in a Foakes v Beer situation. It must be noted, however,

¹⁷⁰Supra at note 9.

¹⁷¹Ibid at page 2QB 617, 624-625; 3 All ER at 37, 840-841

¹⁷²3rd edition, 1977 at pp 398-399.

that in making this statement, Sir Alexander Turner seems to be referring to whether an accord and satisfaction could exist and not whether an estoppel could exist.

However if Sir Alexander Turner was making reference by implication to an estoppel situation, the writer struggles to see the necessity for such a fine distinction. With respect there appears to be little if no difference in principle in agreeing to forego something you will be entitled to and agreeing to forego something you are entitled to. If this has ever been the law, then it is submitted that it has moved on somewhat from the statement of Sir Alexander Turner speaking editorially in a textbook published in 1977. Indeed, the Court of Appeal case in Burbery Mortgage Finance and Savings Limited v Hindsbank Holdings Limited¹⁷³ expressly concerned a promise by a receiver not to enforce his existing legal rights.

Mahon J. went on to state that in any event as long as any requirement prevails that there must be detriment suffered by the promisee as a result of relying upon the promise, it was difficult to see how that can occur where a debtor has paid only part of the debt alleged to be due. It is submitted, that this is indeed a very valid point. If the debt was genuinely in dispute one can see, however, how there might be detriment as the debtor may be paying more than in fact actually due. However, if the debtor's claim, although bona fide is held to have no merit the principle in Couch v Branch Investments¹⁷⁴ will not avail the debtor, as such is a contractual principle. It is in any event difficult to see how such could have occasioned detriment. If any detriment had occurred, surely this could be remedied by payment of damages, and it would not be necessary for the promise of such to be strictly enforced.

Further, it is submitted that the very reason why in most instances an argument as to accord and satisfaction should not succeed is also a very strong reason why promissory estoppel should not succeed in such cases. This reason is that the supposed "representation" that the creditor would not sue for the balance of the debt is normally the banking of the cheque with or without a period of silence by the creditor. This, as it has been submitted earlier, is equivocal and it is for this reason that it is submitted a court should hold that no representation has been made by the creditor nor has the creditor caused the debtor to assume that a certain state of affairs exists.

¹⁷³Supra at note 166.

¹⁷⁴Supra at note 113.

In N.Z.I. Finance Limited v Barber & Anor¹⁷⁵ the facts of which have been dealt with earlier¹⁷⁶ the defendants attempted to argue in the alternative that a promissory estoppel had been established. As will be recalled in that case, the defendants' primary submission was that an accord and satisfaction had occurred as it was submitted the defendants had paid the monies over to N.Z.I. Finance on the sale of certain land, and N.Z.I. Finance had agreed to accept the sum in full and final satisfaction. Master Williams held that no such agreement had taken place as there was no clear offer to accept. His Honour further held that the cheque had not itself been proffered in full and final satisfaction.

Master Williams stated that promissory estoppel required a clear and unequivocal representation made with the intention to affect the legal relations between the parties and be acted on with action taken as a result. He stated that if these requirements were satisfied then the maker of the representation was precluded from asserting his legal rights until reasonable notice had been given. In this regard he cited the decisions of Burbery Finance¹⁷⁷ and Gillies v Keogh¹⁷⁸.

Master Williams held that as no clear representation had been made by N.Z.I. Finance the argument as to promissory estoppel must fail.

A similar result had been reached in an earlier decision of Master Williams in Budget Rent-a-Car Limited v Goodman & Alston¹⁷⁹ although the facts were somewhat different. In that case as will be recalled Mr Goodman was being sued by Budget Rent-a-Car for damage to a hire car which had been occasioned by his friend Mr Alston. Mr Goodman never denied that the money was owing, merely pleaded poverty. Mr Goodman sent a cheque in full and final satisfaction to Budget Rent-a-Car stating that the cheque was being proffered in full and final satisfaction of the dispute. Budget Rent-a-Car banked the cheque and a couple of days later sent a letter stating that the cheque was received in part payment. Master Williams held that it was the fact of payment which was important and payment was not received until a cheque was banked and cleared. He held that by the time payment had been received by Budget or its agents it had or possibly was in the process of

¹⁷⁵Supra at note 138.

¹⁷⁶Supra at page 61.

¹⁷⁷Supra at note 166.

¹⁷⁸Ibid.

¹⁷⁹Supra at note 93.

advising Mr Goodman through his solicitors that it did not accept the cheque had been received in full and final satisfaction of his obligation.

However, although the cheque was in fact banked only a couple of days before the creditor's reply, the reply was in fact sent out over a week after the letter and cheque had been sent to the creditor. Although, Master Williams had held that it was payment that was being bargained for, and therefore effectively no contract could have come into being until the payment of the monies itself had occurred, this, it is submitted, did not necessarily exclude the doctrine of promissory estoppel as consideration was not needed for the same. Master Williams stated that the elements of a plea of promissory estoppel were adequately defined in the judgment of Richardson J. in Gillies v Keogh¹⁸⁰. The Master stated that it was now clear that there was a general test of unconscionability underlying the three necessary elements:

"Namely:

"... encouragement (of a belief or expectation) reliance and detriment ..."

Master Williams held that there was no encouragement by the plaintiff which could have created any belief or expectation. He further held that there was no reliance nor detriment. It had been submitted by the defendant that it had suffered detriment in that he had borrowed \$5,000 and incurred an obligation to repay it. Master Williams held that it was clear that he had borrowed that sum before his solicitors wrote to Budget's agents and therefore any detriment was not occasioned by an act on Budget Rent-a-Car's part.

It is submitted, however, that the issue as to whether a promissory estoppel had arisen was not dealt with properly in the case. If, as the cases have held mere banking of a cheque together with silence is sufficient to amount to an agreement to accept the offer of a cheque proffered in full and final satisfaction, why could the same not lead to a finding that such conduct carried with it a clear representation that the cheque was being so accepted. Here, of course, the answer would be that such conduct was not sufficient to lead the defendant to believe that his offer had been accepted, and further that no detriment had been occasioned as the defendant had always to pay this money and had not altered his position in reliance on any alleged representation. Therefore it would not be unconscionable to renege on such a promise even if made.

¹⁸⁰Supra at note 166.

In the much earlier decision of Master Anne Gambrill of Parmenter v Carter¹⁸¹ promissory estoppel was not pleaded, further, having regard to the findings of the Master it seems that such might have succeeded in the alternative. In that case as will be recalled the defendant forwarded a cheque to the plaintiff's solicitors for \$1,000 in "full and final satisfaction" of the proceeding. The cheque was banked by the office system on 5 May 1988. On 24 May 1988 the solicitors wrote to the defendant advising that they had made an error in banking the cheque. Master Gambrill held on the facts that¹⁸²:

"... the defendant was induced to believe a settlement had been made. I am not satisfied that the plaintiff can shelter behind the situation where it said that if it was not aware of the settlement it could not make an accord with the defendant."

Therefore, although as submitted earlier by the writer it is submitted that the above finding on the facts is incorrect, it would seem that the holding, prima facie would lay the ground for a promissory estoppel claim, as it was held that the defendant was induced to believe by the plaintiff that a settlement had been reached. However, one still runs into the problem as to what detriment would have been suffered by the defendant in paying the sum of money, if it can be shown that he was bound to pay this sum in the first place.

In D.F.C. New Zealand Limited & Anor v Wellington City Council¹⁸³ the plaintiff had pleaded an estoppel as its second cause of action. The facts of this case have been dealt with earlier¹⁸⁴. The first plaintiff claimed that in reliance on the arrangements reached between Messrs Jones and Shillson coupled with the terms of Mr Shillson's letter of 22 September 1989, the City Council's acceptance and banking of D.F.C.'s cheque and the City Council's subsequent conduct up to the end of March 1990, the first plaintiff took no steps to protect its interests as debenture holder over Plaza International Hotel Limited or Forum Developments Limited or both.

The first plaintiff therefore said that it had altered its position in reliance on those matters and that the City Council was thereby estopped from disclaiming the terms

¹⁸¹Supra at note 82.

¹⁸²Ibid at page 11.

¹⁸³Supra at note 37.

¹⁸⁴Supra at pages 18 and 19.

on which it received the second plaintiff's cheque. The first plaintiff therefore sought a declaration to that effect, coupled with an order for specific performance.

The defendant argued, *inter alia*, firstly that estoppel could only be used as a shield and not a sword, and secondly that the first plaintiff had not demonstrated that it had suffered detriment or altered its position in reliance on the defendant's actions.

Master Williams cited the Australian High Court decision in Walton Stores (Interstate) Limited v Maher¹⁸⁵ in support of the proposition that estoppel had been utilised as a cause of action and not just as a defence. However, he stated its status as such was by no means clear-cut and that the summary judgment procedure was only intended to be available where such was the case. However, he stated that putting that to one side the law in the area had recently been clarified by the Court of Appeal in Gillies v Keogh¹⁸⁶ where Richardson J. after reviewing the classic test held that "there has been a trend away from the strict application of those five probanda to a more flexible test of unconscionability". He then stated that Richardson J. went on to hold in the context of *de facto* relationships that the approach:¹⁸⁷

"... involves determining whether the elements of encouragement (of a belief or expectation), reliance on that, and detriment were present."

Master Williams in this case held that the first element was present as the City Council had clearly encouraged D.F.C. in the belief or expectation that it would, as it did, lodge the necessary documents to effect deposit of the air space survey plan without delay and promptly satisfied, as it did up until the end of March or early April 1990, requisitions in relation to that plan. However, Master Williams found difficulty in holding that the necessary detriment was present. D.F.C. had said that the detriment arose because it paid the cheque to the City Council, handed over a title to enable the subdivision or plan to be lodged, refrained from appointing receivers until May 1990 and refrained from negotiating with Forum Developments or the City Council or both. Master Williams stated that the difficulty he had with that was that the payment of the cheque was no more than was required of D.F.C. through its contract with or tender to the Council, the handing over of the title did not seem to him to be

¹⁸⁵Supra at note 164.

¹⁸⁶[1989] 2 NZLR 327.

¹⁸⁷Ibid at page 346.

a matter of detriment since D.F.C. could recover the title as mortgagee if it wished and the delay in appointing the receiver and negotiating with Forum or the Council was only expressed tentatively by Counsel for the first plaintiff. Master Williams stated that even when D.F.C. appointed receivers for Plaza its action did not arise out of the City Council resiling from its agreement with D.F.C.

In those circumstances Master Williams stated that the Court's conclusion was that it could not be said that the City Council had no defence available to it pursuant to the estoppel argument and therefore the summary judgment in respect of that cause of action was dismissed.

Therefore, as can be seen although promissory estoppel looks as if it may develop into a very useful cause of action, the same would be difficult to make out and indeed has not been made out as yet in an action where a cheque has been tendered in full and final satisfaction of a disputed debt, or indeed an undisputed debt. The reasons for this as can be seen are two-fold. Firstly, the same set of facts that would be relied on by a debtor to show that the creditor had agreed to accept the same on the terms it was proffered, would be relied upon by it to establish a promise or encouragement by the creditor leading it to believe that certain state of affairs exists. As was submitted earlier, even in most of the cases where it has been held that the creditor's conduct has led the debtor to believe that such agreement exists, such is wrong in principle. Therefore, if such agreement cannot be inferred from the conduct then a promise or encouragement in the belief that the creditor would not pursue its claim for the balance could not be made out.

Secondly, although there is authority to the effect that compromise of a dispute however hopeless does afford good consideration if the debtor honestly believed he had a good cause of action¹⁸⁸, no such principle exists to help the debtor establish detriment in action alleging promissory estoppel.

The difference between promissory estoppel and waiver is by no means clear-cut. Indeed, Denning L.J. (as he then was) sought to assimilate the two in Charles Rickards Ltd. v Oppenheim¹⁸⁹. If anything the doctrine of waiver is more easy to satisfy than that of promissory estoppel as on one view it would seem that the requirement of detriment does not need to be satisfied. The difficulty

¹⁸⁸and the same is not vexatious or frivolous: Couch v Branch Investments (1969) Ltd., supra note 117.

¹⁸⁹[1950] 1 KB 616.

with waiver, however, is that the person waiving compliance may seek compliance upon giving reasonable notice. Therefore, if a creditor had led a debtor to believe that it would not be relying on its right to sue for the balance of the debt, then upon giving reasonable notice it would be entitled to do so. This, however, can also be true of promissory estoppel.

Cheshire and Fifoot¹⁹⁰ states that the doctrine of waiver is awaiting a clear modern statement. However, the authors state that recent New Zealand cases have made the following points:

1. Like promissory estoppel, a waiver requires a clear unequivocal representation¹⁹¹
2. As in the case of promissory estoppel a waiver can be retracted if this can be done without causing injustice to the other party. Thus it may be able to be withdrawn before the other party has done anything in reliance on it.¹⁹²
3. The waiver takes place before the departure from the strict terms of the contract, although it can take place after the departure. If the waiver precedes the departure it may have played a part in causing the departure and justice may more readily be held to demand that there be no retraction. The learned authors state that where the waiver takes place after the departure from the terms of the contract it can readily become confused with other similar concepts in particular election to affirm the contract and estoppel.

It is perhaps because of the as yet uncertain definition of the doctrine of waiver and its unclear distinction from the doctrine of promissory estoppel that none of the cases subsequent to and including Homeguard have raised or dealt with it in any way.

¹⁹⁰Law of Contract supra note 49.

¹⁹¹Connor v Pukerau Store Ltd [1981] 1 NZLR 385; Neylon v Dickens [1978] 2 NZLR 35 (P.C.).

¹⁹²Connor v Pukerau Store Ltd, *ibid.*

6. Section 21(2)(b) of the Bills of Exchange Act 1908

Mahon J. in Homeguard relied for additional support for his decision on Section 21(2)(b) of the Bills of Exchange Act 1908. Section 21 provides as follows:

"21. **Delivery**-(1) Every contract on a bill, whether it is the drawer's, the acceptor's, or an indorser's, is incomplete and revocable until delivery of the instrument in order to give effect thereto:

"Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

"(2) As between immediate parties, and as regards a remote party other than the holder in due course, the delivery-

"(a) In order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be:

"(b) May be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the bill.

"(3) If the bill is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

"(4) Where a bill is no longer in the possession of a party who has signed it as a drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved."

Mahon J. stated that the terms of delivery of the appellant's cheque fell within section 21(2)(b) of the Bills of Exchange Act 1908 as being "conditional, or for a special purpose only, and not for the purpose of transferring the property in the bill". Mahon J. stated that it therefore followed that the property in the cheque could not pass to the respondent until it complied with the condition. Mahon J. stated that by banking the cheque and then repudiating the condition, the respondent in his opinion converted the cheque. He stated that it might therefore be said that the respondent was precluded

from asserting any right to disclaim the condition and to treat the cheque only as a payment on account, for it could only adopt that course by committing against the appellant the tort of conversion.

It is submitted that Mahon J.'s cursory examination of section 21(2)(b) of the Bills of Exchange Act 1908 failed to deal properly with the issues in hand. The questions, it is submitted, which needed to be asked and were not are as follows:

1. Whether pursuant to section 21(2)(b) delivery was incomplete if the cheque was delivered with a condition attached to it. In other words an analysis of the subsection.
2. If delivery was incomplete if the cheque was sent with a condition attached to it what is the consequence of such incomplete delivery?
3. If the cheque is banked and the condition repudiated, has conversion been committed?
4. If conversion has been committed is the creditor precluded from asserting his own wrong and therefore estopped from denying that he assented to the condition?

It would seem that the strict wording of section 21(2)(b) is rather unfortunate as it would seem as a matter of strict statutory interpretation that it could be argued that section 21(2)(b) could not be used as long as the bill was delivered even with the intention of transferring property in it.

The subsection adds the additional requirement not only that the cheque may be shown to be conditional or for a special purpose only but also that it must be shown to have been delivered not for the purpose of transferring the property in the bill. Therefore, it would seem that if the bill was delivered subject to a condition or for a special purpose only as long as it was delivered for the purpose of transferring the property in the bill then section 21(2)(b) could not apply.

However, if this interpretation is correct then section 21(2)(b) would be of little use, as why would one deliver a negotiable instrument unless it was with the immediate or contingent purpose of transferring the property in it. It might be that the subsection is meant to be concerned only where delivery is not for the primary or immediate purpose of transferring the property in the bill. Therefore, for example, it could be delivered as security and therefore subject to the condition that it not be used unless the debtor defaulted on some agreement. Such could

also be reasoned to apply in cases of cheques proffered in full and final satisfaction if it could be argued that it was not intended that the cheque be used unless the condition had been agreed to.

Indeed, such is very similar to a deed being delivered in escrow. Halsbury states¹⁹³ that the English equivalent of section 21(2)(b) is akin to escrow except that for escrow the deed must be delivered to a third party whereas pursuant to the equivalent of section 21(2)(b) the negotiable instrument may be delivered to one of the parties thereto.

Indeed in the early New Zealand case of Russell v Hellaby¹⁹⁴ a cheque was delivered for the purchase of a motor vehicle, subject to the condition that certain matters would be put right. The matters were not put right and the purchaser returned the car and stopped the cheque. It was held that pursuant to section 21(2)(b) the cheque was delivered pursuant to a condition and for a special purpose only and not for the purpose of transferring the property in the bill. It was held the fact that the cheque had been delivered pursuant to a condition and the condition had not been fulfilled was sufficient to prevent property passing in the bill and was a good defence to action by the plaintiff on the cheque. It was held that if the cheque was stopped then the parties reverted back to the same position they were in if the cheque had not been made.

Therefore it would seem that section 21(2)(b) can be used where a cheque is sent pursuant to a condition that payment is not meant to be effected on it if the condition is not fulfilled. This would support the analysis that s 21(2)(b) is concerned that the cheque be delivered not only on a condition or for a special purpose but not for the immediate or dominant purpose of transferring property in the bill.

It would also seem that section 21(2)(b) is simply a procedural section which allows evidence outside the bill to be admitted where it would otherwise not be. This would seem clear as a matter of statutory interpretation from the opening words of section 21(2)(b) that the delivery "may be shown to have been conditional,"

Therefore, having overcome the first hurdle of showing that section 21(2)(b) may be invoked in such instances as evidence may be admitted to show that the delivery was conditional, what effect does this have. In other words, what is the effect of conditional delivery. Section 21

¹⁹³Laws of England, 4th ed. Volume 4, para 347.

¹⁹⁴[1922] NZLR 195.

tells us that until delivery of the instrument occurs, the contract on the bill is incomplete and revocable. Therefore it would seem that delivery completes the contract on the bill and makes it irrevocable. If delivery is conditional does this mean it has not occurred until the condition has been complied with, or has occurred and can be vitiated if the condition is not complied with.

The word irrevocable would suggest the latter interpretation is the correct one, however, paradoxically the word incomplete would suggest the former. On balance it would appear that the former interpretation is more tenable having regard to the wording of section 21(2)(b) that the delivery may be shown to be conditional "and not for the purpose of transferring the property in the bill". So therefore applying this logic until the condition is met delivery has not occurred and therefore the contract on the bill is incomplete.

Delivery passes property in the bill to the party intended to hold it. Once they have the property in the bill they may extract payment.

It would therefore follow that if payment was extracted when the party extracting it held no property in the bill then that party would be dealing with the property in the bill in such a manner that was inconsistent with the owner's rights and conversion would have been committed. Or as Salymond states¹⁹⁵:

"The wrong of conversion consists in any act of wilful ... interference with a chattel done without lawful justification, whereby any person entitled thereto is deprived of the use and possession of it."

It would seem negotiable instruments are capable of being converted, however, as a general rule currency is not although banknotes, coins or money that is in some way specially identifiable may be ¹⁹⁶. Therefore if a cheque is banked and the condition repudiated it would seem that conversion has been committed.

This leads one to the next question as to whether if conversion has been committed in such circumstances the creditor is precluded from asserting his own role and therefore estopped from denying that he has assented to

¹⁹⁵(1905) 21 LQR 43, cited in Todd Law of Torts (1991), 1st ed., at page 489.

¹⁹⁶Sackwell v Barclay's Bank [1986] 1 All ER 676;
International Factors Limited v Rodriguez [1979] QB 351 (CE??)

the condition. This will be dealt with in more detail in the next chapter.

The next case following Homeguard which dealt with a cheque proffered in full and final satisfaction which dealt with section 21(2)(b) was Brown v Reardon¹⁹⁷ the facts of which have been dealt with earlier.¹⁹⁸

As will be recalled, Casey J. on appeal held on the facts that the correspondence amounted to a modification, of the unequivocal condition about settlement originally imposed by the appellant's solicitors, to an arrangement that the respondent's solicitors could hold the cheques until they replied after seeking further instructions. Casey J. held that their action in banking the cheques was in breach of that arrangement but not of the original terms relating to settlement which were no longer operative.

Casey J. stated at worst it could be said that Mr Reardon's solicitors were wrong in taking the cheques without authority and could be liable in conversion applying section 21(2)(b) of the Bills of Exchange Act 1908. He referred to Mahon J.'s dicta at the end of his judgment in Homeguard where he relied on section 21(2)(b) as an additional ground of liability as the creditor had no legal right to bank the cheque without accepting the condition upon which it was sent. Mahon J. stated the section provided that property did not pass in the bill if it was conditional or for a special purpose only which had not been fulfilled.

Casey J. stated that in the course of submissions he had expressed his view that notwithstanding the use of the words "additional ground" Mahon J. may have only intended these observations as a support for the conclusion that the creditor must be regarded as assenting to the conditions of tender in taking the cheque rather than deliberately intending to commit a wrong as he felt echoed Baron Bramwell's comments in Crofts v Lumley, which he had cited earlier.

As can be seen Casey J. dealt with the provision of section 21(2)(b) of the Bills of Exchange Act 1908 as cursorily as Mahon J. did in Homeguard. No thorough analysis was undertaken as to what the section really meant or was concerned with. It was merely held that a conversion had been committed in the creditor banking the cheque and repudiating the condition. However, Casey J. expressed the view that section 21(2)(b) could not be

¹⁹⁷Supra at note 66.

¹⁹⁸Supra at page 30.

availed itself as a stand-alone cause of action available to a debtor in such circumstances.

The next case along the chain dealing with section 21(2)(b) was that of Kirkland v Lindisfarne Landscape Limited¹⁹⁹. The facts of this case have been dealt with earlier²⁰⁰.

As can be seen this is a case where it would seem that there was a high degree of merit in the debtor's actions.

After holding for the debtor on the accord and satisfaction argument on somewhat tenuous grounds Vautier J. went on to deal with the application of section 21(2)(b) of the Bills of Exchange Act 1908. Vautier J. stated that in his view the banking of the cheque "constituted an irretrievable manifestation of assent by the respondent to the condition imposed by the appellant" was strengthened by the fact that the terms of delivery of the cheque fell as Mahon J. had pointed out within the scope of section 21(2)(b) of the Bills of Exchange Act. He stated accordingly the property in that cheque could not pass to the respondent until it had complied with the condition. He stated that the respondent had clearly fully appreciated that the cheque was in its hands only on a conditional basis and by proceeding the very next day to bank the cheque it had demonstrated it his view that it was accepting the condition notwithstanding its expression on the previous day of an unwillingness to do so.

Therefore, as can be seen, Vautier J. as in Homeguard viewed section 21(2)(b) although preventing property passing in the cheque, merely as adding additional support for his conclusion that the banking of the cheque constituted an irretrievable manifestation of assent to the condition imposed on it. This, it is submitted, is correct as far as it goes as s21 would seem to be merely a procedural section and not one which would be available as a stand-alone cause of action. However, Vautier J. also failed to deal with the interpretation of and rationale behind section 21(2)(b) of the Bills of Exchange Act 1908.

The next case to deal with section 21(2)(b) was that of Equitable Securities Limited v Neil²⁰¹. In that case the debtor owed the creditor monies which were secured under first and second mortgages. In the mortgagee sale under

¹⁹⁹Supra at note 69.

²⁰⁰Supra at page 32.

²⁰¹[1987] 1 NZLR 233.

the first mortgage the property realised insufficient funds to pay off even the first mortgage. Bankruptcy proceedings were instituted against the debtor and the claim was settled. The debtor's solicitor sent to the creditor's solicitor a cheque and stated that it was tendered in full and final settlement of the balance outstanding from the debtor to the creditor. The cheque was then duly banked by the creditor's solicitor.

A short time later the creditor's solicitors wrote to the debtor's solicitors acknowledging the cheque but seeking a substantial amount due under the second mortgage. The debtor's solicitor had been unaware of the second mortgage. She responded saying the cheque had been in full and final settlement of all claims.

In the District Court Judge Callendar entered judgment for the debtor. The debtor had argued an accord and satisfaction had been effected but on this argument the plaintiff had succeeded as it was held no consideration had been supplied as the debt in question was an undisputed unliquidated sum.

However, the debtor also argued that section 21(2)(b) of the Bills of Exchange Act 1908 applied as the cheque had been delivered subject to a condition which was clear in its meaning and that on the basis of the reasoning of Mahon J. in Homeguard the creditor was as a matter of law precluded from disclaiming the condition once he had banked the cheque. This argument succeeded. The creditor then appealed to the High Court.

In the High Court the appeal was allowed by Chilwell J. on the grounds that the condition accompanying the cheque was unclear and a fair interpretation would be that it was in full settlement of the bankruptcy proceedings. There is, however, very little in the judgment to suggest that Chilwell J. doubted the reasoning of Mahon J. in Homeguard. Such reasoning was merely distinguished on the facts.

Professor D.W. McLauchlan in his article Cheques in Full and Final Satisfaction: accord despite discord?²⁰² states that he feels the District Court judge's decision was understandable given the way Mahon J. expressed his reasoning in Homeguard. However, the learned author states that if Mahon J. was correct the same argument regarding the tort of conversion might in logic be applicable in a situation where the creditor banks the full payment cheque but proceeds for the balance on the grounds of want of consideration. Indeed, this is what occurred in the following case.

²⁰²Supra at note 10.

In James Cook Hotel Limited v Canx Corporate Services Limited²⁰³ the defendant had sent the plaintiff a cheque representing 28% of a liquidated and undisputed debt due to the creditor in respect of accommodation provided for the Stevie Wonder concert party. The letter sent with the cheque stated that the cheque was tendered in full and final settlement of the account and that banking of the cheque would be deemed to be acceptance of the offer.

A week later the plaintiff's solicitors replied stating that the cheque was not accepted as full settlement of the account and unless full payment was made within 21 days the cheque would be banked in part payment and proceedings issued for the balance. No reply was received to this letter and the cheque was therefore duly banked and proceedings issued to recover the balance.

In this case counsel for the defendant conceded that the debt was never in dispute and that there was no question of accord and satisfaction "in a strict contractual sense". He nevertheless argued that pursuant to section 21(2)(b) of the Bills of Exchange Act 1908 the banking of the cheque in part payment had discharged the debt. In doing so he argued that section 21(2)(b) constituted a further hitherto unrecognised exception to the rule in Foakes v Beer. The issue was ably dealt with by Greig J.

The defendant claimed support for its contention from the three New Zealand authorities of Homeguard, Brown v Reardon²⁰⁴, and Kirkland v Lindisfarne Landscape Limited²⁰⁵. However, Greig J. stated that although all three of these cases made reference to section 21 and at least two of them appeared to put some reliance upon the provisions of that section in at least obiter, all three were distinguishable from the present case as none of them dealt with the situation where the rule in Foakes v Beer applied, but were strictly cases of accord and satisfaction.

Greig J. referred to Mahon's "further argument" where the action of the creditor in banking the cheque and ignoring the condition was said to be a conversion or a tort. The conversion it was argued would preclude the respondent from asserting the right to act in that way and thus claim the right to commit a tort. He stated that latter aspect had not yet been relied upon in this case by the defendant. He stated that it did not strictly fall to be decided but he expressly reserved his views upon it noting the contention against it mentioned by Professor D.W.

²⁰³[1989] 3 NZLR 213.

²⁰⁴Supra at note 66.

²⁰⁵Supra at note 69.

McLauchlan in his article Cheques in Full Satisfaction: accord despite discord?²⁰⁶. In this article Professor McLauchlan stated that even if banking the cheque and repudiating the condition amounted to conversion, why did it necessarily follow that the creditor must be taken to have agreed to that condition. McLauchlan posed the question as to what was the basis for a finding that tort equalled contract. The learned author hypothesised why could it not be that the creditor admitted that he had committed the tort but denied the contract. The learned author stated the creditor ought to be entitled to say "sue me for damages: if you do I will counter-claim for the full amount of the debt, and if you don't I will sue you for the balance anyway". The learned author further hypothesised was not the same argument regarding the tort of conversion applicable in the situation where the creditor banked the full payment cheque intending all along to claim the balance on the ground that any agreement would not be binding for want of consideration.

Whether conversion can lead to an estoppel will be dealt with in the next chapter.

In relation to section 21 Greig J. stated as follows²⁰⁷:

"Section 21 of the Act is a section about delivery. Delivery is an essential element for the conclusion and giving effect to a bill or cheque. Issue or first delivery is essential to make the cheque complete. Subsections (3) and (4) of 21 provide for presumptions as to valid delivery in certain circumstances. Subsection (2) provides for two things. One is limitation in para. (a) of the authority of the person making the delivery. Unauthorised delivery is not delivery as defined. Paragraph (b) allows the immediate party and others (except the holder in due course) to show that it is conditional and not for the purposes of transferring the property in the bill. The first purpose of that subsection is to allow evidence to be given of that which would otherwise be extrinsic and inadmissible. ...It is to that extent a rule of procedure or evidence not a rule of substantive law. Furthermore, it is limited to conditions which show that delivery or the transfer was not for the purpose of transferring the property in the bill. A typical example is a transfer in escrow or a payment on some other condition which means

²⁰⁶Supra at note 10.

²⁰⁷Supra at note 203 page 218.

that the cheque is not delivered and is otherwise incomplete."

It is submitted, that Greig J.'s analysis of section 21 is indeed correct, and that such allows extrinsic evidence to be given that delivery is incomplete. For as the section states, until delivery has occurred the contract on the bill is incomplete and revocable. His Honour however, it is submitted, failed to deal with the question as to whether conversion could be committed if evidence was admitted by virtue of s21(2)(b) that such cheque was delivered on a condition. His Honour further failed to analyse the effect such conversion might have. This failure may however be explainable as, due to his finding, such did not need to be considered.

Greig J. went on to note that if the defendant's contention were correct then it would provide a complete defence to Foakes v Beer so long as a bill of exchange, promissory note or cheque was used in the partial payment in satisfaction of the whole. He further stated that the application of section 92 of the Judicature Act would be very limited if section 21 had the effect contended for. This argument will be dealt with in more detail in Chapter 8 of this paper.

The next case dealing with section 21(2)(b) of the Bills of Exchange Act 1908 was that of D.F.C. New Zealand Limited and D.F.C. Financial Services Limited v Wellington City Council²⁰⁸. The facts of this case have been dealt with earlier²⁰⁹. Master Williams in this case went thoroughly through the case law to date. He agreed with the decisions in Equitable Securities and James Cook Hotel to the effect that the court may admit evidence that the cheque was delivered on the conditions set out in Mr Shilson's letter of 22 September and for that special purpose. He held²¹⁰:

"For the reasons earlier set out, it has been held that Mr Shilson made those conditions clear to Mr Jones. Since, first, the delivery of D.F.C.'s cheque to Mr Jones was clearly intended by the parties to transfer property in the cheque and, secondly, since section 21(2)(b) is intended to be procedural and not substantive, it follows that it does not create a separate cause of action. It follows that the second plaintiff cannot succeed on its cause of action

²⁰⁸Supra note 37.

²⁰⁹Supra at pages 18 and 19.

²¹⁰Supra at note 37 at page 34.

in the application of the summary judgment to that extent is accordingly dismissed."

It is submitted, that although the second point made by Master Williams in the above quotation is correct that the first is not. As delivery of the cheque is conditional, then it is not complete and the contract on the bill is incomplete and revocable and property in the bill is not intended to pass. As stated above, it is submitted that in such circumstances, that although s21(2)(b) affords no separate cause of action, it may allow evidence to be admitted which would show that conversion has indeed been committed. The real question now in all these cases is does this conversion lead to an estoppel denying the creditor the right to repudiate the condition.

7. Estoppel by Conversion?

As was stated in the previous chapter, Professor McLauchlan in his article Cheques in Full and Final Satisfaction: accord despite discord?²¹¹ stated that there was no such thing as estoppel by tort. This is not quite true, as there exists a doctrine known as estoppel by negligence. This is a species of estoppel by conduct and as such as been described as a rule of evidence²¹². The party in whose favour estoppel by negligence operates is the victim of the fraud of some third person facilitated by the careless breach of duty by that person to the other party.

Cross states that estoppel by negligence "has been criticised by some as misleading as it is merely a branch of estoppel by conduct. He states further that²¹³:

"It is possible that when the cases and underlying principles come to be authoritatively reviewed it would seem that the requirements of duty of care and proof of carelessness can be dispensed with. All that is necessary, it may be urged, is proof of intentional words, acts or conduct, which can reasonably be construed as a representation by the representor to the representee who need not be in that direct relationship."

Therefore, according to the reasoning of Cross it can be argued that if one party by his words conduct or indeed negligence has represented to the other party that a state of affairs exists he will not be allowed to go back on that representation. In the present case, therefore if it could be said that the creditor in banking the cheque which was subject to a condition had led the debtor to believe that such condition was accepted then he would be prevented from asserting that it was not. Therefore, as can be seen this is merely the question of fact involved when one is ascertaining whether or not the creditor has agreed to the condition or offer by words or conduct. This may also be done by his negligence.

However, the law does not seem to have gone so far as to assert that a person is precluded from setting up his own wrong. Public policy can invalidate contracts, but there appears to be no rule of law that public policy can impose contracts, and this would be effectively what would be

²¹¹Supra at note 10.

²¹²Cross The Law of Evidence, 1969, 4th ed.

²¹³Ibid para 3.57 at page 159.

occurring if the creditor was held to be precluded from asserting the true state of affairs which may be that he has committed a wrong.

Halsbury²¹⁴ discusses the matter of damages for conversion of a negotiable instrument. He states that such is the face value of the instrument and where a bill of exchange is converted the converters normally claim the amount of principal and interest due. The writer could find no authority for the proposition that conversion could lead to an estoppel, or indeed the broader principle that a person may be estopped from setting up his or her own wrong.

²¹⁴Supra at note 193 volume 45, para 1461.

8. Section 92 of the Judicature Act 1908

In all cases, involving cheques proffered in full and final satisfaction, the same is for a lesser sum than the creditor feels is owing to him. At common law, the rule is laid down in Pinnel's Case²¹⁵ that:

"Payment of a lesser sum on the say in satisfaction of a greater cannot be any satisfaction for the whole."

This rule was approved by the House of Lords in Foakes v Beer²¹⁶. In this case Mrs Beer had obtained a judgment for £2,090 19s against Dr Foakes. Sixteen months later a written agreement was entered into, which was drawn up by Dr Foakes' solicitor whereby Mrs Beer undertook not to take "any proceeding whatsoever" in consideration for Dr Foakes paying £500 immediately and then paying certain specified instalments "until the whole of the said sum of £2,090 19s shall have been paid and satisfied". Some five years later, when Dr Foakes had paid the sum under the settlement agreement Mrs Beer claimed £360 for interest on this judgment debt.²¹⁷ The House of Lords upheld her claim, and in doing so approved the rule outlined above in Pinnel's Case²¹⁸.

Some commentators²¹⁹ have argued that the rule in Foakes v Beer is outdated. Chitty argues that the rule in Foakes v Beer may sometimes have performed the function of protecting the creditor against exploitation by a debtor. However, the learned author argues that this function is now more satisfactorily performed by the expanding doctrine of duress, and that the rule no longer serves any useful purpose. Chitty states:²²⁰

"In some circumstances an agreement to accept part payment of a debt in full settlement may be a perfectly fair and reasonable transaction."

However, it is submitted, that although a strict application of this rule may prove harsh in certain circumstances, that a reasonable compromise has been

²¹⁵(1602) 5 Co. Rep. 117a

²¹⁶Supra note 5.

²¹⁷Beer v Foakes (1883) 11 QBD 221, 222.

²¹⁸Supra at note 215.

²¹⁹e.g.: Chitty on Contract Supra note 54 at para 227.

²²⁰Ibid.

introduced through section 92 of the Judicature Act 1908. This section states:

"An acknowledgement in writing by a creditor or by any person authorised by him in writing in that behalf, of the receipt of part of his debt in satisfaction of the whole debt shall operate as the discharge of the debt, any rule of law notwithstanding."

This section was originally passed in an amending act in 1904 and is now section 92 of the Judicature Act 1908.

This provision is a statutory exception to the rule in Foakes v Beer.

The wording of the section would seem to be equally applicable to a receipt of part of a disputed or unliquidated debt or in a receipt of part or an undisputed or liquidated sum. However the cases seem only concerned with the application of such section to the latter situation. This may be as the former situation is already adequately protected by the principle that payment of a lesser sum in such circumstances constitutes consideration.²²¹

Prior to the decision in Homeguard there were very few cases which even mentioned section 92 of the Judicature Act 1908. This may be as if the provisions of such section are clear, creditors would not normally seek to sue to enforce the balance where it is clear they were precluded from doing so. The first of such cases was a decision of Stout C.J. in Meikle v The Wellington Loan Company (Limited)²²². This was a case concerning an action for wrongful arrest. The arrest appears to have taken place for the non-payment of a debt, although the reasons for the arrest are not expressly enunciated in the judgment.

Stout C.J. held that the plaintiff was non suited and there was therefore no question to leave for the jury. His Honour held firstly that the debt in question had not been released. His reason for holding the same was as follows:²²³

"... it appears to me clear that this debt has not been released. Under the English Common Law, even up to the present time there needs to

²²¹Couch v Branch Investments (1969) Ltd, supra at note 113.

²²²[1911] 31 NZLR 217.

²²³Ibid at page 218.

have been a statute passed lately - no debt could be released by payment of part of it; the whole of the debt had to be paid in full. There could not be release of a debt unless you got the release under seal; you could not by mere oral bargain have your debt released by paying part. Thus if a person owed another person £20 and paid him £10 even if the party agreed to accept the £10 in full settlement it would not be in full. We passed an amending act, and now section 92 of the Judicature Act 1908, allows part payment of a debt to be deemed full payment if an acknowledgement to that effect is given in writing. There was an acknowledgement of receipt in writing, but it did not acknowledge that the debt was released. On the contrary on the face of the receipt it says that all that is released is the principal sum and costs. There is no mention whatever of interest, and interest was due and that interest has not been paid."

It was held secondly that in order to bring a writ for wrongful arrest the plaintiff had to have the original judgment set aside and that had not been done.

Cheshire and Fifoot²²⁴ state that historically there have been four exceptions to the rule in Foakes v Beer. These are as follows:

1. Payment by cheque or promissory note - now overruled by the English Court of Appeal in D. & C. Builders Limited v Rees²²⁵.
2. Section 92 of the Judicature Act 1908.
3. Accord and satisfaction where the consideration is seen as compromise of a claim where there is a bona fide belief that the amount is owing.²²⁶
4. Promissory estoppel.²²⁷

²²⁴Law of Contract, supra at note 49.

²²⁵Supra at note 46.

²²⁶This matter has been dealt with in Chapter 5 of this paper.

²²⁷This matter has been dealt with in Chapter 5 of this paper.

Cheshire and Fifoot²²⁸ state that the requirements for satisfying section 92 of the Judicature Act 1908 are as follows:

1. There must be an acknowledgement of receipt of part payment in full satisfaction of the debt.
2. This acknowledgement must be in writing.
3. It must be signed by the creditor or any person authorised by him in writing.

If these requirements are fulfilled then the receipt operates as a discharge for the whole debt. As can be seen in the case of Meikle dealt with above the claim failed as there was not an acknowledgement that the whole debt was released.

The next case dealing with s92 was that of Chambers and others v Commissioner of Stamp Duties and others²²⁹. In that case a mother held a mortgage of land from her son to secure a named principal sum together with "further advances" and interest, with a provision for acceptance of interest at a lower rate for prompt payment.

The interest on this mortgage fell into arrears. The mother, with the intention of forgiving the interest in arrears took the steps detailed below, as consequence of which both mother and son believed that all arrears up to a certain date had been forgiven.

There were two types of remission. In the first the mother agreed to remit the interest due and write it off. Sometimes the mother had capitalised the interest and then written it off. In the second class the mother had rendered an account for the interest at a rate lower than that provided for in the mortgage.

In the mother's account book and the accounts rendered to her son, she had indicated a complete forgiveness of the interest. Her accounts at the date of death showed none of the said arrears as due and owing.

In 1937 the mother and son executed a memorandum of reduction of mortgage debt by which the principal sum secured was reduced to four percent. No reference was made therein to the arrears of interest.

The son, believing that all arrears of interest prior to the memorandum of reduction had been effectively forgiven

²²⁸Law of Contract, Supra at note 49 page 106.

²²⁹[1943] NZLR 504.

made no application under the Mortgagors and Lessees Rehabilitation Act 1938 for the adjustment of his liabilities thereunder.

On the death of the mother the Commissioner of Stamp Duties took the position that the arrears had not been legally forgiven and were an asset in the estate. These proceedings were then commenced by consent against the Commissioner of Stamp Duties.

In the High Court Blair J. held that all but one debt were legally owing to the mortgagee. He held that one debt had been legally forgiven as evidenced in writing in the hand of the deceased so as to satisfy section 92, but the others had not.

His Honour stated that the elements necessary to obtain the benefit of that section were:

- (a) an acknowledgement by the creditor of his acceptance of part of the debt in satisfaction of the whole debt;
- (b) That acknowledgement must be in writing; and
- (c) Such an acknowledgement may be given by an authorised agent of the creditor; but if so then the authority to the agent must be in writing from the creditor, and such authority must be an authority to give such acknowledgement.

There were instances where there were written acknowledgements of remissions or forgivenesses signed by the deceased mother's husband on his wife's behalf, but there was nothing in the nature of written authority from his wife to him to make any such acknowledgement. Blair J. therefore held that section 92 was no help to the plaintiff in such situation.

However, there was one account from the mother to the son showing the interest as at a certain date with receipt of certain monies paid in reduction thereof. At the bottom of that document there was in the mother's handwriting the following:

"Received payment.

Margaret Chambers

With thanks, 10 February
1936"

Blair J. stated that one could stretch that document insofar as it was a receipt for payment of money as an acceptance of part of the debt within section 92 of the Judicature Act 1908. The receipt was for one half year's

interest paid on 10 February 1936 but it was held it also was in effect a receipt for the other half year's interest previously paid on 9 September 1935 and stretching that process he would apply it to both half year's payments. Therefore it was held that there was a binding acceptance of interest at a lower rate in discharge of that debt.

Counsel for the son had also submitted that at common law in cases such as this, payment of part of a debt constituted a discharge of the whole debt. Blair J. however stated that the fact that the legislature deemed it necessary in the year 1904 to enact what is now section 92 of the Judicature Act 1908 afforded some indication that it was deemed desirable to afford some relief to the rigour of the law and further afforded indication that the common law was too harsh. He stated that one might go so far and say that having provided a means whereby the rigour of the common law was mitigated then it may well be that the rigour remains unless properly got rid of by taking the appropriate steps under section 92.

Blair J. stated that as he understood the common law the general rule was that acceptance of a smaller sum in satisfaction of a debt for a larger amount was not binding as there was no consideration. His Honour stated that there had been a great many decisions which may be said to be exceptions to that general rule but these cases when examined were not really exceptions to the general rule that the only way to discharge a contract by performance is to perform fully everything which the contract requires to be done.

His Honour further stated that these so-called exceptions when examined would be found to be ones where a new contract had been entered into in substitution for the old contract. However, performance of part of an existing duty was not such consideration, which would be necessary for a contract in substitution. His Honour further stated that in some old cases relating to acceptance of part of a debt in discharge of the whole, the court had in effect found a substituted contract although it must be confessed that it looked as if the court had stretched the position somewhat to find something new in the situation.

His Honour held that he was unable to find in respect of any of the reductions of interest made by the mother in her account anything in the nature of a substitute contract which would have the effect of validly discharging the plaintiff's common law liability in this contract constituted by the mortgage.

Therefore, as will be seen the case although succeeding on one debt failed on the others primarily as there was no signed authority by Mrs Chalmers given to her husband to make acknowledgement of receipt of payments in satisfaction of the debt.

It is submitted, that this particular requirement seems unduly harsh, and one could be thrown back on the general rules of agency to determine the same. If, therefore, it could be shown that the person making the acknowledgement had either express authority to make the same or had been held out to the debtor in such a way as to suggest to it that person had authority then this should be sufficient.

The next case dealing with the matter was that of Re McCathie (deceased)²³⁰. In that case the deceased and the defendant had entered into an agreement where the defendant purchased from the deceased a property comprising 450 acres and certain stock and implements for £19,300. This was to be satisfied in a variety of ways, the last of which was to pay the sum remaining outstanding of £7,462 in cash on the day of settlement.

There also existed a deed of forgiveness of debt which recorded the deceased forgiving the sum of £3,500 from the total outstanding of £7,462. This was signed by the defendant probably on the same day as he signed the agreement for sale and purchase, i.e., 3 May 1957. However, due to an oversight, it was never signed by the deceased.

Subsequently a further deed was prepared and this time executed by the deceased on 30 June 1958. The same stated that the sum of £3,962 which remained owing as "the balance of the said sum of £7,462" was forgiven.

In connection with this latter deed a gift statement was completed. This was signed by the deceased. The date of his making it was 1 July 1958 and the portion headed 'Particulars of Property' contained the following:

"Forgiveness of the balance of the cash payable by the Donee to the Donor under Agreement for Sale and Purchase bearing date 30 May 1957 made between the Donor and the Donee."

This deed was presented for stamping on 1 July 1958 and gift duty was duly paid on it.

After the deceased's death the defendant took title to the land and the original transaction was settled.

The question which remained to be answered in this case was whether the defendant still owed the £3,500.

It was argued by the defendant that section 92 of the Judicature Act 1908 operated in his favour.

²³⁰ [1969] NZLR 393

It was submitted by the executors that it was a well-established principle of law that a release of debt is ineffective unless it is made under seal, or unless some valuable consideration is given in return for it. It was further argued that the document in the form of a deed signed by the defendant but not by the deceased and referring to the forgiving and releasing of the amount of £3,500 fell short of what was required to establish a release by way of gift in law.

Counsel for the defendant referred to the operative part of the deed which stated that "in consideration of the natural love and affection which the Donor bears towards the Donee he the Donor does hereby forgive and release unto the Donee the sum of three thousand nine hundred and sixty two pounds ... being the balance of the aforesaid sum of £7,462".

Counsel for the defendant then submitted that this was an acknowledgement in writing that the deceased accepted £3,962 in satisfaction of the whole amount of £7,462 and that pursuant to section 92 this operated as a discharge. Counsel for the executors' argument in reply was that there was not the slightest indication in the deed that the deceased was accepting anything less than was owing to him, and in fact no part of the debt of £7,462 was ever "received" by the deceased at all and that if the document was an acknowledgement of "receiving" anything at all it was an acknowledgement of receiving the whole of the debt, the sum of £3,962 being the "balance" left over after that already received. Moller J. upheld the submission and held that section 92 was of no assistance to the defendant in this case.

As can be seen this decision also appears somewhat unduly harsh. There seems to be no logical reason why any sum should have to be received in order for a debt to be discharged. There appears to be no rationale for saying that the debtor must in fact receive some monies in order to be able to validly forgive that which is owing. Surely a creditor should be able to acknowledge in writing that he was writing off such debt. The answer to this may be that such can be effectively done by deed, however, this appears, it is submitted, unduly technical and there seems no reason in logic why the same could not be done by an acknowledgement by the creditor in writing.

In Homeguard Mahon J. states that by section 92 of the Judicature Act 1908 a legal balance was struck between two practical but conflicting considerations. His Honour states²³¹:

²³¹Supra at note 1 at page

"On the one hand, there was the robust criticism of Pinnel's Case founded on a basis not only conceptual but pragmatic; on the other, there was the danger of permitting a mere payment on account to be the subject of controverted and uncertain testimony as to whether it was a sequel to an oral agreement wholly discharging the debtor. Section 92 recognised and alleviated the type of criticism advanced by Sir George Jessel and Lord Blackburn, but at the same time protected a creditor against fraud by adopting the basic mechanism of the Statute of Fraud itself; that is, by requiring the debtor to produce evidence of the extinction of his liability and acknowledgement in writing signed by the other contracting party.

In New Zealand therefore, as from 1904 where it is sought to establish that a monetary liability was represented by an undisputed and liquidated sum, but that the liability has been consensually discharged by payment of a lesser sum, the debtor must produce as evidence of that transaction either a formal deed or a written form of acknowledgement which complies with the terms of section 92, otherwise the rule in Foakes v Beer will apply and the agreement will be nudum pactum and unenforceable. In order successfully to invoke section 92, its terms must be strictly complied with. A written acknowledgement by the creditor in the exact terms of the section must be proved. Cf Chambers v Commissioner of Stamp Duties [1943] NZLR 504."

It is submitted firstly that the authority of Chambers v Commissioner of Stamp Duties is not an exception to that general rule, but authority for the situation that acknowledgement in exact terms of section 92 need not be provided. However, with respect, Mahon J.'s analogy with the Statute of Frauds is a good one. It, is therefore submitted, that as long as acknowledgement of either receipt of part payment in discharge of the full, or discharge for the full debt is provided in writing then the requirements have been satisfied. If section 92 was amended along these lines, then it is submitted that it would provide more effective relief to the harsh consequences which can result from a strict application of the rule in Foakes v Beer.

None of the cases subsequent to Homeguard concerning cheques proffered in full and final satisfaction appear to analyse section 92 of the Judicature Act 1908 in

detail, although many of them mention it in passing²³². It is submitted, that the reason for this is that in the majority of the cases concerning cheques proffered in full and final satisfaction the creditor has not in fact agreed to release the balance, as if it had done so it is not likely to have issued proceedings for the balance. It is, indeed, this genuine lack of agreement which is a strong reason for not imposing agreement on the parties, by conduct or otherwise if it is clear that none existed.

It is therefore submitted that section 92 of the Judicature Act 1908 affords a useful tool to debtors to have the balance of their debt effectively written off by the creditor, where that is the clear intention of the parties. However, in this regard it is submitted that to make section 92 more practicable that firstly monies need not be actually received by the creditor and secondly that the authorisation for the person signing such acknowledgement on a creditor's behalf need not be in writing, but that the usual rules as to agency should apply, and where it can be shown that there was an agency in fact, or that the person held himself out in this regard that such should be sufficient.

²³²e.g., NZI Finance Limited v Barber supra at note 82, at page 11.

9. Policy Considerations

The rule in Homeguard even if wrong in principle had the benefit of certainty of application. The law in its present state, it is submitted, is not only not in accordance with basic principle but affords no certainty to the parties.

There are strong policy considerations, it is submitted, which need to be taken into account in laying down a rule that either allows the creditor to bank the cheque and repudiate the condition, or that makes banking of the cheque deemed to be acceptance whether or not such has in fact occurred. One can foresee injustice in either set of circumstances. For example a debt may be genuinely disputed on reasonable grounds. The debt may be for \$600, where the debtor alleges only \$300 is due and the creditor alleges that the full \$600 is due. By way of bona fide compromise the debtor may send the creditor a cheque for \$450 in full and final settlement of the claim, thereby effectively "splitting the difference". The creditor may receive such cheque and while accepting that such is a fair compromise may bank the cheque, repudiate the condition and sue for the balance which may be subsequently found to be owing. With such a scenario one can see that the justice may be completely on the debtor's side.

However as an alternative scenario a debt may be genuinely disputed but on unreasonable grounds. The debt may be for \$600, the debtor claiming that \$300 only is due. The debtor may send a cheque for \$300 in full and final settlement hoping that the same will be banked by the creditor's office system without the creditor realising in fact that such condition was attached. The cheque may be so banked by the creditor's office system with the creditor himself receiving the letter with the full payment condition the next day. The creditor may immediately on receipt of the same write back to the debtor saying that the cheque is not accepted in full and final satisfaction, and a court may hold that by virtue of his banking the cheque he is precluded from suing for the balance. One can see that in this situation the justice is clearly on the side of the creditor.

It is submitted, that there are in reality only two reasons why a debtor would send a cheque with his offer to give such an amount in full and final settlement. The first would be where he hopes that such would act as an irresistible treat to the creditor who may feel that he is better to take some money now as opposed to having to claim for monies that might not eventuate in the future. The second possibility is that the debtor intends to trick the creditor into receiving the same in full and final settlement hoping that he will bank it without noticing

the condition or alternatively will bank it not realising the significance of the condition.

It is submitted that the first alternative put forward above can equally be achieved by a debtor offering this money in settlement with payment within say seven days by bank or trust account cheque. Further, numerous cases to date highlight the difficulty in cheques being banked by creditors' office systems without appreciation of the consequences.

These policy considerations are well discussed in American case law. In Homeguard Mahon J. held that the law in New Zealand was the same as that in the United States of America in that banking the cheque tendered in full and final satisfaction effected an accord and satisfaction at that point. However, although this may effectively be the United States common law, since 1968 when the Uniform Commercial Code was adopted by most of the States in America, there has been considerable debate as to whether the code overrides the United States common law mentioned and followed in Homeguard.

The common law in the United States is as follows²³³:

"... if a debtor offers its creditor a sum of money in full settlement of a disputed claim, and the creditor uses the offered sum, the creditor is bound by the proposal. The creditor is held to have accepted the settlement and the original claim is fully satisfied. Attempts by the creditor to protest the full payment condition of the offer will be unsuccessful. The common law doctrine does not permit the creditor to take the benefit of the offer without also accepting its burdens."

However, some courts in light of this have suggested that section 1-207 of the Unified Commercial Code has overridden the United States common law doctrine of accord and satisfaction. Section 1-207 states²³⁴:

"A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudiced the rights reserved. Such words as 'without

²³³You can't have your cake and eat it too: accord and satisfaction survives the Uniform Commercial Code
Patricia B. Fry, North Dakota Law Review Volume 61
353.

²³⁴Ibid at page 354.

prejudice', 'under protest' or the like are sufficient."

Therefore, some courts and commentators have suggested in the United States that a creditor may cross out the payment conditions and write such words as 'under protest' and then proceed to bank the cheque and sue for the balance. As in New Zealand and Commonwealth law the debt needs to be undisputed or unliquidated before consideration can be deemed to have been provided. The banking of the cheque is merely deemed under common law to be acceptance of the full payment offer.

The stipulation of the Uniform Commercial Code is slightly different to the stipulation under New Zealand common law. Under the Commercial Code as outlined above the creditor has to write such words as 'under protest' in order to be able to proceed to accept the balance; whereas under New Zealand law as it presently stands the creditor has to write back to the debtor straight away or within a 'reasonable' time stating that the full payment condition is not accepted.

However, in the United States as in New Zealand at the present time there has been a divergence of opinion over such issue. United States writers and courts dealing with the decision as to whether the Uniform Commercial Code overrides the United States common law in such circumstances have put forward strongly differing points of view. Corbin²³⁵ states:

"It is unfair to the party who writes the check thinking that he will be spending his money only if the whole dispute will be over, to allow the other party, knowing of that reasonable expectation, to weasel around the deal by putting his own mark on the other person's check..."

Further, in the Wisconsin Supreme Court decision of Flambeau Products Corporation v Honeywell Information Systems Inc²³⁶ the court reversed the lower court's decision to the effect that the section 1-207 of the Uniform Commercial Code overrode the United States common law concerning full payment cheques.

In that case the cheque sent in full and final satisfaction of a dispute was received by a lockbox depository used by Honeywell to process incoming cheques. Contrary to its authority under its agreement with

²³⁵Corbin on Contract Vol VI A at page 396.

²³⁶116 Wis. 2d 95, 341 NW 2d 655, 37 UCC Rep. Serv 1441 (1984).

Honeywell the lockbox processed and deposited the full payment cheque. Immediately Honeywell learned of the cheque being deposited it wrote to Flambeau indicating that it did not agree to the deduction and demanding the remaining balance plus interest. Honeywell, however, did not return the proceeds of the cheque to Flambeau. Flambeau brought an action for declaratory release against Honeywell and was granted summary judgment by the trial court.

On the first appeal, the case was remanded to the trial court because the record contained no evidence of a dispute at all on liquidated claim. However, after trial on remand judgment was once again granted to Flambeau on the grounds that an accord and satisfaction had been effected. Honeywell then appealed to the Wisconsin Court of Appeals which ruled that section 1-207 operated to permit Honeywell to retain the process of the cheque without being bound by an accord and satisfaction. The Court of Appeals stated that the American common law was harsh and that by it creditors were subjected to the overreaching of debtors.

However, the Supreme Court overruled this decision. It stated that one of the purposes of the Code was to simplify, clarify and organise the laws governing commercial transactions. This court further stated that applying section 1-207 to the full payment cheque would not actually accomplish these purposes. It felt instead it would eliminate a simple technique for settlement while permitting sophisticated parties to arrange their affairs to secure the benefits of the full payment cheque.

The court stated that the common law doctrine of accord and satisfaction rested both on principles of contract law and public policy. The public policy it stated was that of encouraging the informal resolution of disputes without litigation and the policy of fairness. It disagreed with the view of the Court of Appeal that it would be unfair to require Honeywell to return the proceeds if it was to preserve its claim for the balance and stated²³⁷:

"The interests of fairness dictate that a creditor who cashes a check offered in full payment should be bound by the terms of the offer. The debtor's intent is unknown, and allowing the creditor to keep the money disregarding the debtor's conditions seems unfair and violative of the obligation of good faith which the UCC makes applicable to every contract or duty."

²³⁷Ibid, 341 NW 2d at 663, 37 UCC Rep Serv at 1451.

Therefore as can be seen policy seemed to be foremost in the Court's mind. However, it is submitted that the useful settlement tool is simply accord and satisfaction simpliciter. That is a debtor may simply offer a sum in full and final satisfaction indicating that the money is readily available upon the offer being accepted. At law, as was discussed earlier, consideration is afforded where a bona fide dispute is settled, whether or not such dispute existed upon reasonable grounds, as long as the same is not vexatious or frivolous. This by itself provides a useful tool for settlement and means that parties can settle a claim genuinely in dispute without need to resolve who would eventually succeed. It is further submitted that sending a cheque in full and final settlement can merely lead to a form of entrapment where a creditor banks a cheque unaware of the condition or banks the cheque in ignorance of its consequences.

Patrick J. Boyle in his article on the recent Missouri Court of Appeals decision in the United States²³⁸ briefly summarises the policy considerations put forward by various courts and commentators for and against allowing the Uniform Commercial Code to override the United States common law concerning full payment cheques. He states²³⁹ that several authors had asserted that the applications of the Uniform Commercial Code section 1-207 to full payment cheques would destroy a valuable settlement tool and constitute an added burden on the court system. The learned author states that this viewpoint did not appear to be correct. The Court of Appeals in the Majestic case to which he was referring had observed that a suit for the balance of the debt rather than a suit for the entire debt placed no additional burden on the court system.

In addition the learned author states that the courts had correctly pointed out that the creditor who received a full payment cheque from the debtor would not necessarily reserve his right to sue for the balance of the debt. The court further stated that even if the creditor did reserve his rights he would not necessarily bring suit to enforce his rights. The learned author further stated that commentators who disagreed with the application of section 1-207 also believe that the debtors will lose the benefit of full payment cheques because creditors can accept or reject a cheque and still have a right to collect the balance. The debtor would then have no choice but to sue

²³⁸Majestic Building Material Corp v Gateway Plumbing Inc: Missouri Courts Alter the Common Law Accord and Satisfaction Doctrine by applying UCC Section 1-207 to Full-Payment Checks. Saint Louis University Law Journal vol 31, 133.

²³⁹Ibid at page 148.

for the amount disputed or pay whatever he felt to be the correct amount and wait to be sued.

The learned author states that this rule was also incorrect. He states commentators had observed that a debtor might negotiate an executory settlement agreement with a creditor prior to tendering a full payment cheque. He felt, it is submitted correctly, that this approach would preserve the full payment cheque as a settlement tool although he felt that the practice would be slightly less convenient.

The learned author further states that other commentators in the United States had argued that the common law doctrine of accord and satisfaction in the United States may be commercially unreasonable because the doctrine forced a creditor to refuse an amount which was clearly owing to him merely to preserve his right to sue for the entire disputed amount. The learned author states that it was unfair to allow a debtor to use an amount that was owed to a creditor to pressure a settlement and he felt the proper decision was reached in Majestic.

In a later article, Pamela K. Strom Amlung analysed a recent Ohio Supreme Court decision which held that section 1-207 of the Uniform Commercial Code overrode the United States common law as to cheques proffered in full and final satisfaction²⁴⁰. In that case the decision was reached by a majority. The majority cited a commentary by White and Summers on the Uniform Commercial Code that characterised the typical debtor who used a payment in full cheque as a chiseller who was attempting to get away with paying less than he truly owed.²⁴¹ Based on this line of reasoning the majority concluded that the framers of the Code must have intended to prevent debtors from taking advantage of creditors. The court also, the learned author stated, concluded that the Ohio General Assembly adopted section 1-207 with the intention that creditors would be protected from losing rights when cashing payment in full cheques. In doing so the court expressly overruled the common law doctrine of accord and satisfaction and announced the following rule²⁴²:

²⁴⁰Ohio's interpretation of the Uniform Commercial Code section 1-207 - you can have your cake and eat it too: AFC Interiors v DiCello, 46 Ohio St. 3D1, 544 DE 2D869 (1989).

²⁴¹White and R. Summers, Uniform Commercial Code para 13-24 (3D ed. 1988). Cincinnati Law Review vol. 59 page 1006.

²⁴²Ibid at page 1006.

"... when the creditor receives a payment in full check for an amount less than that alleged due, he may negotiate the check without losing his rights to collect the remainder alleged due, if he explicitly reserves those rights by endorsing the cheque in a manner sufficient to alert the debtor that the check was not accepted as full payment."

The dissenting judges in this case argued as one of their reasons for dissent that the doctrine was a useful settlement tool. In support of this conclusion the learned judges followed the reasoning of a Supreme Court of Maine decision²⁴³. The Supreme Court of Maine had held essentially that in issuing a payment in full cheque the debtor compromised his own right of withholding payment in exchange for a chance that the cheque would settle the dispute. If the creditor could reserve his right and still accept the payment the debtor would have no incentive for issuing the cheque.

It is submitted that although it is indeed correct that a debtor would have no incentive for issuing the cheque in such circumstances, that such does not in reality lead one anywhere. If the debtor's aim was to settle the dispute, the same could effectively be done by an offer of payment in full and final satisfaction with an indication that the money was ready to be handed over.

The learned author of the article aforementioned stated²⁴⁴ that the underlying policy by the majority's decision was the belief that the full payment cheque placed the creditor at the mercy of the debtor who wrote the cheque. The majority, the learned author stated, favourably cited a dissenting opinion from an Ohio Appellate Court which advocated placing the risk of loss upon the debtor who wrote the payment in full cheque not the creditor²⁴⁵.

It is submitted on balance that policy dictates an interpretation of any rule in favour of the creditor. The argument which is used in a large majority of the States in the United States in favour of the common law rule that banking of a cheque proffered in full and final satisfaction is deemed to be acceptance of the same, is that such is a useful settlement tool. This, it is submitted, would not be negated by such an interpretation.

²⁴³Stultz Elec. Works v Marine Hydraulic Eng'g Co., 484 A 2d 1008, 1011, 1011-1012 (Me. 1984).

²⁴⁴Supra at note 240 page 1015.

²⁴⁵Inger Interiors v Peralta 30 Ohio App. 3d 94, 98, 506 NE 2d 1199, 1202-1203 (1986).

It is submitted that such useful settlement tool could just as equally be preserved as it is at present in New Zealand by a debtor making such offer without enclosing a cheque for the same. Such, it is submitted is equally tempting to a creditor where he has been told that the money is immediately available.

However, it is submitted that if an interpretation in favour of the debtor prevails then such allows the debtor to take advantage of the creditor's office system which may bank the cheque without noting the condition, or the creditor's ignorance in not realising the implications of banking such cheque. Therefore, it is submitted that the reasoning of Mahon J. in Homeguard which followed the American 'rule of law' is not only not correct in principle, but is also not correct in policy.

10. Conclusion

It is submitted that the decision in Homeguard is incorrect as it is not in accordance with established common law principles; and neither are the cases to a large extent after it which either follow it or attempt to distinguish it. It is further submitted that it is not correct, in policy as it allows debtors to take undue advantage of creditors' office systems or ignorance of the law.

It is submitted that all such cases have overlooked the well-established common law rule that silence cannot amount to acceptance and that acceptance needs to be communicated either expressly or by conduct. Such conduct it is submitted must amount to the clear and unequivocal assent to the offer and it is submitted that in general banking a cheque simpliciter does not as there is more than one reason why a creditor may bank a cheque. It is submitted that that further overlooks the rationale behind the rule in Felthouse v Bindley that there should be no onus on the offeree to reject the offer.

It is submitted that if the common law principles enunciated above were followed sufficient certainty would be created as a creditor would never be taken to have assented to the debtor's offer unless he has expressly stated that he has, or has acted in such a clear unequivocal fashion that on the balance of probabilities no other reasonable interpretation could be placed on his actions.

This does not mean that the debtor would have no remedy where a creditor had wrongly banked a cheque proffered in full and final satisfaction while repudiating the condition. The debtor would have an action in conversion on the cheque or in restitution seeking the monies to be paid back to him. However, in many cases if the creditor was held to be entitled to the balance the balance could be counter-claimed and offset against the sum to which the debtor was entitled.

The doctrine of accord and satisfaction is merely a division of the law of contract, which seeks to enforce agreements not impose them.

BIBLIOGRAPHY

- 1 Anson Law of Contract (by A.G. Guest), 1984, 2nd edn
- 2 J.H. Black Promises Enforceable Without Consideration, Masters of Law Research Paper 1990-1991, Law of Torts
- 3 P.J. Boyle Majestic Building Material Corp v Gateway Plumbing Inc.; Missouri Courts Alter the Common-Law Accord and Satisfaction Doctrine by Applying U.C.C. Section 1-207 to Full Payment Checks (1986), 31 Saint Louis University Law Journal, 133
- 4 J.F. Burrows Cheques in Full Settlement [1987] NZLJ 341 and 359
- 5 J.F. Burrows Update on Contract 1991, NZLS Seminar (1991)
- 6 Cheshire and Fifoot The Law of Contract, 1988, 7th edn
- 7 Chitty Chitty on Contracts, 1989, 26 edn
- 8 B. Coote The Essence of Contract (1990) JCL 91, 188
- 9 B. Coote Cheques "in Full Satisfaction" of a Larger Sum [1981] NZLJ 20
- 10 Corbin Contracts, 2nd edn (1964) Supplement (1980)
- 11 Cross Cross on Evidence (by D.C. Mathieson), 1969, 4th edn
- 12 S. Dukeson Confirmatory Promises and Consideration [1990] NZLJ 380
- 13 P.B. Fry You Can't Have your Cake and Eat it Too: Accord and Satisfaction Survives the Uniform Commercial Code, (1985) 61, North Dakota Law Review, 353
- 14 Ginnow & Nikovic Corpus Juris Secundum Volume 1 (plus supplement)
- 15 Greig & Davis The Law of Contract, 1987, 1st edition, (and cumulative supplements to 1990)
- 16 W.J. Grosse & E.P. Goggin Accord and Satisfaction and the 1-207 Dilemma, (1984) Commercial Law Journal (U.S.A.) 537

- 17 R. Halsom Sailors, Sub-Contractors and Consideration
(1990) LQR 183
- 18 D.W. McLauchlan Cheques in Full and Final Satisfaction: Accord
Dispute Discord? [1987] 12 NZULR 259
- 19 D.W. McLauchlan Cheques in Full Satisfaction: An Update [1989]
NZ Recent Law Review 399
- 20 J.C. Smith The Law of Contract, 1989, 1st edn
- 21 P.K. Strom Amlung Ohios Interpretation of Uniform Commercial
Code Section 1-207 - You Can have your Cake
and Eat it Too: AFC Interiors v Di Cello, 46
Ohio St 3d 1, 544 N.E. 2d 869 (1989), (1991)
59 Cincinnati, Law Review, 1002
- 22 Treitel The Law of Contract, 1987, 7th edn